BEFORE THE
SURFACE TRANSPORTATION BOARD

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

COMMENTS OF THE WESTERN COAL TRAFFIC LEAGUE, FREIGHT RAIL CUSTOMER ALLIANCE, AND NATIONAL COAL TRANSPORTATION ASSOCIATION

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Dated: June 30, 2022

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In response to the Surface Transportation Board's ("Board" or "STB") decision in the above-captioned proceeding on April 1, 2022, the Western Coal Traffic League ("WCTL"), Freight Rail Customer Alliance ("FRCA"), and National Coal Transportation Association ("NCTA") (collectively, "Shipper Groups") submit these comments in support of the proposal to adopt rules to incent the rail carriers to use private railcars more efficiently by accessing charges when the cars are unduly delayed.

I.
IDENTITY AND INTEREST

WCTL is a voluntary association, whose regular membership consists entirely of shippers of coal mined west of the Mississippi River and transported by rail.[1] WCTL is the only organization dedicated exclusively to promoting the interests of its members in reliable and cost-effective coal transportation by rail.

[1] WCTL's members are Ameren Missouri, Arizona Electric Power Cooperative, Inc., Austin Energy (City of Austin, Texas), CLECO Power LLC, CPS Energy, Entergy Services, Inc., Evergy, Inc., Lower Colorado River Authority, MidAmerican Energy Company, Minnesota Power, Nebraska Public Power District, and Western Fuels Association, Inc.

For more than forty-five (45) years, WCTL members have made extraordinary investments in private railcar fleets, often at the behest – or the mandate – of the railroads on which they depend. These unit trainsets, typically provided at no cost to the railroads, support the transportation of millions of tons of coal each year.

WCTL actively participated in the Board's hearing in EP 754, *Oversight Hearing on Demurrage and Accessorial Charges* ("*Demurrage Oversight Hearing*"), held on May 22-23, 2019. WCTL's Written Testimony (filed May 8, 2019), oral testimony (presented May 23, 2019), and Supplemental Comments (filed June 6, 2019), which addressed problems with the railroads' implementation and application of demurrage and accessorial charges that stem primarily from the imbalance between freight rail shippers and railroads, as exacerbated by the implementation of precision scheduled railroading ("PSR"). WCTL, together with Seminole Electric Cooperative, Inc., filed joint comments in EP 757, *Policy Statement on Demurrage and Accessorial Rules and Charges*, and in EP 759, *Demurrage Billing Requirements*.

The Freight Rail Customer Alliance, www.railvoices.org, is an umbrella membership organization that includes large trade associations representing more than 3,500 electric utility, agriculture, chemical, and alternative fuel companies and their consumers. The mission of FRCA's growing coalition of industries and associations is to obtain changes in Federal law and policy that will provide all freight shippers with reliable rail service at competitive prices. FRCA filed a letter supporting the petition to initiate the rulemaking in EP 768 with the Board on August 19, 2021. FRCA also submitted written comments in EP 754 (May 8, 2019 and June 6, 2019), participated in the oral hearing in that proceeding (May 23, 2019), submitted written comments in EP 757 (November 6, 2019), and submitted written comments in EP 759 (November 6, 2019 and June 5, 2020).

The National Coal Transportation Association ("NCTA"), www.movecoal.org, is a non-profit national organization consisting of electric utilities, coal producers, and entities that have an interest in the production and transportation of coal for the purposes of generating safe and reliable electricity for consumers nationwide. This group includes entities that produce, repair, and manage all facets of railcar components parts and systems, and also those entities that provide services and products for various operations and environmental compliance requirements at the power plant site. NCTA members have a continued interest in the direct and ancillary costs of operating and maintaining a modern fleet of railcars to transport coal. NCTA filed a letter supporting the petition to initiate the rulemaking in EP 768 with the Board on August 30, 2021. NCTA also submitted written comments in EP 754 (May 8, 2019), participated in the oral hearing in that proceeding (May 23, 2019), submitted written comments in EP 757 (November 6, 2019), and submitted written comments in EP 759 (November 6, 2019, and June 5, 2020).

The Shipper Groups are interested in the fair treatment of shippers regarding the total cost of adequate service, including the costs of building and maintaining the shippers' facilities. The massive investment that the Shipper Groups have made in private railcars has been undermined by the poor service provided by the Class I carriers. Members experienced lengthy delays and long cycle times as railroads curtail service and, more recently, force members to park trainsets. At the same time, the rail carriers subject shippers to rigorous on-time performance requirements and impose high demurrage and accessorial charges whenever shippers fail to meet those requirements. In short, shippers are forced pay more in order to receive less.

The Shipper Groups thus have a strong interest in ensuring that demurrage and accessorial fees are more equitable and support "reverse demurrage" and other measures that promote the efficient use of private railcars.

II.
INTRODUCTION AND SUMMARY

Members of the Shipper Groups, like all rail shippers, have experienced train delays and long cycle times due to PSR and other railroad operational problems. Most members of the Shipper Groups that ship coal in unit trains (referenced for convenience as "Coal Shippers"), particularly in the West, also report being required to park trainsets that could be used instead to deliver coal that would reduce the need to burn very expensive natural gas and rely on purchased power. A key cause is that the railroads currently have no financial incentive to consider the shippers' investment in railcars as part of the overall transportation cost.[2] The problems are exacerbated by the railroads' operational changes, adoption of PSR, and pursuit of lower operating ratios that leave the railroads less able to respond to changes in traffic, particularly as they have fewer crews to move traffic.

[2] It is noteworthy that the very requirement that coal shippers furnish their own cars, at no cost to the carriers, rests upon a dubious legal footing. *Potomac Elec. Power Co. v. United States*, 584 F.2d 1058 (D.C. Cir. 1978).

The Board should propose and adopt a rule to incent the efficient use of private railcars because: (1) Class I carriers do not currently handle private railcars expeditiously, and cycle times are deteriorating further; (2) such a rule will provide a needed baseline for contracts; (3) "reverse demurrage" or fees for the improper handling of railcars constitutes a valid exercise of the Board's jurisdiction over "car service" pursuant to 49 U.S.C. § 11122(a), as opposed to "transportation service;" and (4) requiring the efficient handling of private railcars does not require the railroad to reduce service or standards for movements in railroad cars.

These points and the specific questions raised by the Board are discussed more fully below.

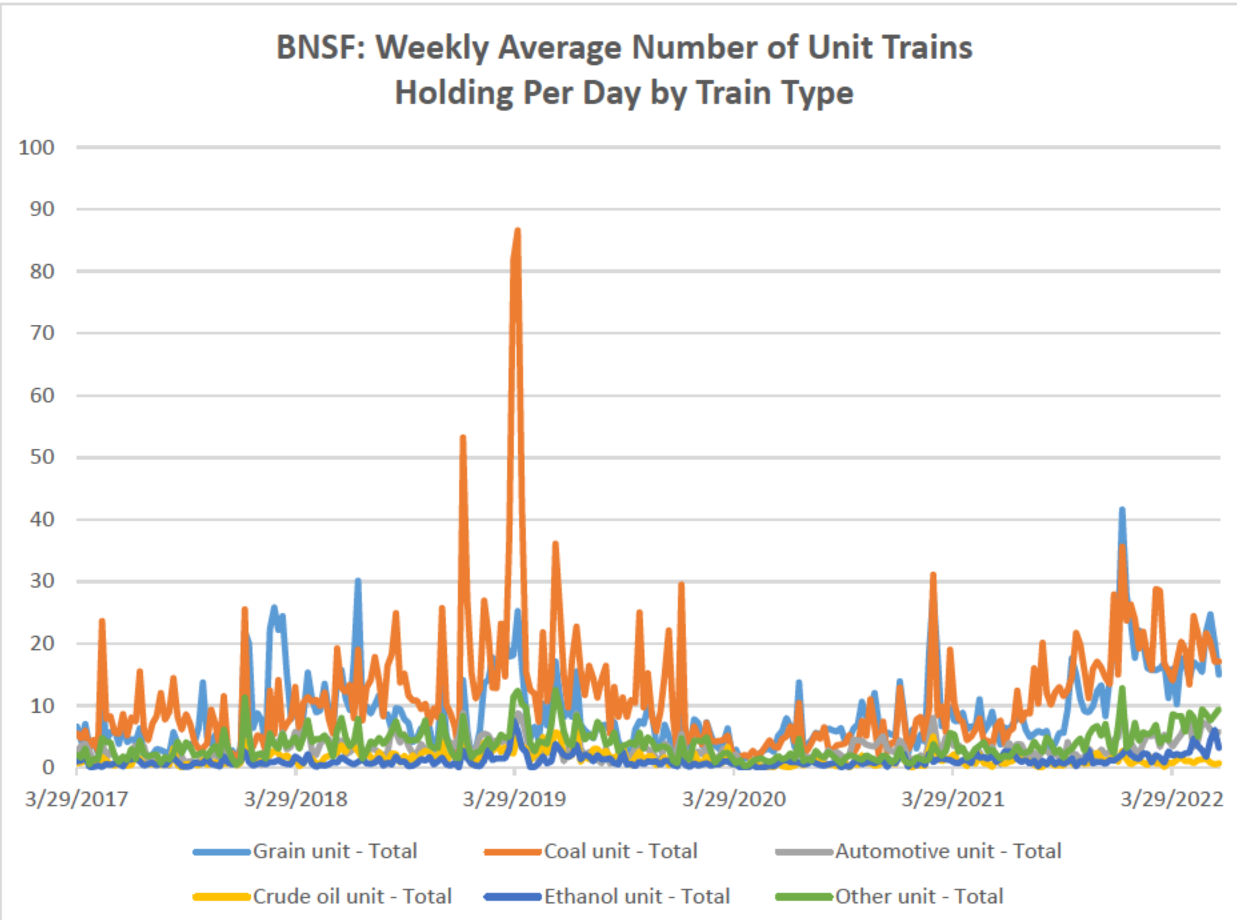
III.
DISCUSSION

A. A Rule to Incentivize the Efficient Movement of Private Railcars is Warranted and Necessary to Protect Shippers' Interests

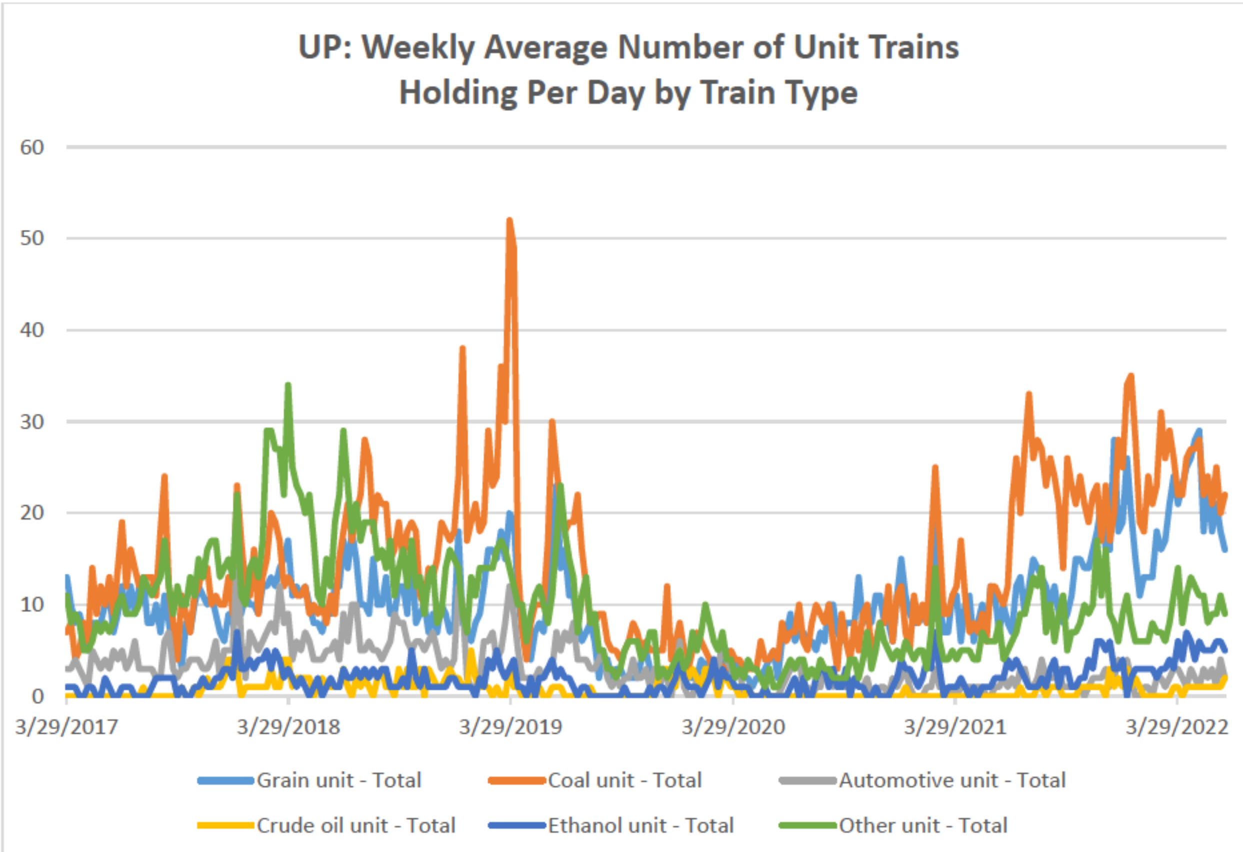
The need and interest in "reverse" or "reciprocal" demurrage extends for more than a century.[3] The current need is much more acute, as the average number of trains reported as being held continues to increase. BNSF Railway Company ("BNSF"), for example, recently reported that its percentage of average trains holding was up 12.3%

[3] Historically, states enacted statutes (presumably now preempted) that allowed for demurrage regulations to extend to carriers when there was a delay in furnishing cars to shippers. *See* S.C. Code Ann. § 58-17-2060 (dating from 1917); Ga. Code Ann. § 46-9-51 (dating from 1905); Ark. Code Ann. § 23-10-437 (dating from 1909).

from its baseline.[4] Most significantly for Coal Shippers, the Union Pacific Railroad Company ("UP") and BNSF (collectively "Western Railroads") both continue to report that more coal trains are held than other types of trains and that the number of coal trains held is currently growing, and as illustrated by the charts below.



[4] BNSF Status Update, *Urgent Issues in Freight Rail Serv. – R.R. Reporting*, EP 770 (Sub-No. 1) (filed June 3, 2022) at 3 (BNSF Service Recovery Plan chart with "Key Performance Indicators").



The problem is compounded by the fact that recent coal deliveries by both carriers in 2022 are below the levels delivered in 2021, and gas prices for the first half of 2022 are substantially higher than they were in the first half of 2021.

As discussed in more detail below, maintaining the status quo will subject shippers to demurrage, accessorial fees, and storage fees for private rail cars at the same time they receive inadequate rail service and confront higher operating costs resulting from unilateral operational changes made by the carriers and the implementation of PSR. A rule is clearly warranted and necessary to incentivize carriers to handle private railcars efficiently and to treat the shippers' investment in private railcars as part of the overall transportation cost.

1. Class I Carriers do Not Handle Private Railcars Efficiently

a. While holds of more than 72 hours for unit coal trains are not frequent, delays of more than 24 hours are common and should be subject to charges.

Coal Shippers report the total time private cars are held at one location does not typically exceed 72 hours. However, delays of more than 24 hours, and up to 48 hours, are common, and cause substantial harm. Cycle times have increased significantly. One WCTL member reports that cycle times are often 200 percent longer than typical, and that a trip that once averaged only four to six days now often takes over twelve days. Another Coal Shipper reports cycle times increasing on average more than 50 hours from June 2021.

One Coal Shipper's data for the first five months of 2022 reveals that the most significant delays were at the plant. For example, in May, 38 percent of the trains were delayed more than 24 hours, and multiple trains were delayed more than 30 hours at the plant. The loaded transit times also show additional delays, with transit times ranging from 85+ hours to over 190 hours.

The cumulative impact of these less than 72-hour delays become very substantial when considered in the context of unit coal trains that are typically 120 cars or longer. In terms of pure mathematics as well as adverse impact on shipper investment, a 24-hour delay of 120 cars is equivalent to having 40 cars delayed for 72 hours each. Accordingly, if a rule is adopted to address a delay of 72 hours for a single private car, then the rule should also apply to unit trains that experience a single delay event of 24 hours, or multiple individual delay events of at least 10 hours each that cumulatively amount to at least 72 hours during one cycle.

b. Carriers frequently cite "crew issues," but operational changes also cause delays and holding of private rail cars.

Carriers typically cite crew availability as the most frequent cause for these delays, especially over the weekends. However, a related factor is the ever more prevalent practice of doubling trains, such that the same train crew and/or lead locomotives must pick up a second train and, at some point, separate the two trains for loading or unloading. One Coal Shipper reports that every other unloaded train experiences a significant delay at the plant after it is released for this reason. Doubling trains may reduce the number of crews or fuel consumption, but the trade-offs include excessive delays as well as bunching, both which drive up operational costs for the Coal Shippers and result in less efficient utilization of their equipment and lower fuel deliveries.

c. Locations where private rail cars are held varies.

Coal Shippers report that trains can experience holds at a variety of locations. One Coal Shipper notes that empty trains may sit enroute to the mines, loaded trains may sit en route to the plant, and empty trains released at the plant may sit there waiting for a crew. Another Coal Shipper reports the most significant and repeated delays were not in transit, but at the plant after the train had been unloaded and released.

d. Holding private freight cars negatively impacts operations and increases energy and transportation costs.

Holding private freight cars causes longer cycle times, which reduces the volume of coal that can be delivered. Many Coal Shippers report that their coal inventories are well below target going into the summer peak. *E.g.,* Darrell Proctor, *EIA*: U.S. Coal Stockpiles Lowest Since 1978 (Dec. 7, 2021). The shortfall exposes Coal Shippers to higher energy production costs and their customers to higher energy bills if coal conservation measures are required or coal generation is displaced by more expensive natural gas or purchased power. Coal Shippers also face potential penalties under their coal supply contracts for failing to take minimum annual volumes.

In additional to holding and delaying trainsets in service, the carriers have been requiring shippers to park cars and trainsets so that the railroads can address their "excess car inventories," meaning the carriers' own shortage of crews and locomotives. Several Coal Shippers have been required to park more than one trainset, and one Coal Shipper was required to park three trainsets. These actions force shippers to forfeit the value of their investments that they made precisely so that they could receive adequate volumes of coal when service suffered and/or gas prices spiked.

The double trains also result in train bunching, especially at the destination. Even where demurrage charges arising from bunching can be successfully disputed, the shipper still experiences delay and reduced deliveries.

e. Operational changes by the Class I carriers have greatly increased the frequency and severity of delays from holding private freight cars.

The frequency and severity of the delays from carriers holding private freight cars flows directly from operational changes by the Class I carriers. Even before the pandemic, the railroads reduced their operating and other personnel as part of PSR, and staffing shortages remain a problem. Doubling trains also contributes to delays, as invariably one train must be held in order to make the longer train. The railroads lack the track infrastructure needed for meets and passes of the longer trains. The railroads then operate at lower speeds either to conserve fuel or to separate the longer trains, which further reduces throughput.

While they reduce their own speeds, impose demurrage, and utilize longer trains that cause delays and bunching, the railroads also impose more demanding turnaround (loading and unloading) requirements on shippers, along with higher and more frequent demurrage and accessorial charges (some of which are no longer being reported to the Board).

2. Rail Contracts do Not Adequately Address the Inefficient Handling of Private Railcars

Unit train coal contracts typically lack provisions that protect shippers from the carriers' mismanagement of privately owned railcars. Until roughly twenty years ago, coal shippers often were able to negotiate such protections, but the railroads sought to reduce or eliminate such provisions through their "public pricing" and other initiatives.

Even where protections existed, they were typically geared towards average cycle times or volumes of deliveries, as opposed to excessive holds of railcars while in transit.

For its part, UP observes that there are "sometimes" contracts with service commitments and concludes that "[a]dopting new a [sic] rule and penalties would be inconsistent with the national policy of minimizing regulatory control over the rail transportation system because shippers already have the means to obtain relief."[5] There is no demonstration that such provisions are common or effective, and the experience of Coal Shippers is that neither is the case. What is needed is recognition of a baseline obligation to use private equipment efficiently, especially if carriers are empowered to impose charges and burdens on shippers for delaying trains that are already subject to substantial delays caused by carriers. Whether a railroad and shipper would negotiate something else in a private contract is a separate matter, but a baseline obligation would make it more likely that the shipper would receive something in return, as opposed to having to accept the inadequate and unfair service terms dictated by the railroad.

3. The Board has Adequate Regulatory Authority and Factual Predicate to Adopt Regulations Addressing "Car Service"

a. The Board has the necessary authority to regulate "car service" pursuant to 49 U.S.C. § 11122(a)(2)

The Board has the necessary authority pursuant to 49 U.S.C. § 11122(a)(2) to intervene and require that railroads compensate shippers when the railroads hold or detain private railcars for an unreasonable amount of time. UP and the other railroads

[5] UP Reply, *Petition for Rulemaking to Adopt Rules Governing Private Railcar Use by Railroads*, EP 768 (filed Aug. 30, 2021) ("UP Reply") at 11.

assert that the Board lacks statutory authority to promulgate regulations because Congress eliminated the use of the term "freight cars" in the Railroad Revitalization and Regulatory Reform Act of 1976. The term "freight cars" was added back to the Act in 1978 and remained in all subsequent versions of the statute. The 1978 Recodification states:

> Sections 1 and 2 of this Act restate, without substantive change, laws enacted before May 16, 1978, that were replaced by those sections. Those sections may not be construed as making a substantive change in the laws replaced. Laws enacted after May 15, 1978 that are inconsistent with this Act are considered as superseding it to the extent of the inconsistency.[6]

UP's argument regarding the 1978 Recodification provision rests on a prior Board decision citing *Kawasaki Kisen Kaisha Ltd. v. Regal-Beloit Corp.*, 561 U.S. 89 (2010) ("*Kawasaki*"), where the Supreme Court, addressing the Carmack amendment, held that discrepancies between the 1976 and 1978 statutes must be resolved in favor of the 1976 statute. The Court in *Kawasaki* emphasized that the 1978 recodification was not intended to enact any substantive change in the law. The Court recognized that applying the 1978 recodification to inland portions of international shipments under a single bill of lading would dramatically expand the Carmack Amendment's scope beyond its historical coverage. On that basis, the Court ruled that preference must be given to the 1976

[6] Pub. L. No. 95- 473, § 3(a), 92. Stat. 1466.

statute.[7] Whereas no previous versions of the Carmack amendment contained the 1978 authority, the Commission's historic authority to regulate other aspects of carriage, including the use of "freight cars," is not disputed by the Respondents.[8] Lastly, the 1976 and the 1978 statute both recognize the Board's authority to issue regulations regarding other terms of any arrangement for "any locomotive or vehicle not owned by the rail carrier." The requested rule thus falls within the ambit of the Board's authority under 49 U.S.C. § 11122 to issue regulations regarding the "efficient use of freight cars," including compensation, for "use by a rail carrier of a locomotive, freight car, or other vehicle not owned by the rail carrier."

b. The Railroads Have Created the Service Problem and Related Artificial Freight Car Issues

The Board noted in its most recent decision in EP 770 that "key performance indicators, such as system average train speed and average number of trains holding per day, indicate performance is well below historical norms."[9] The railroads have failed to take adequate and decisive action to address the service problems. "Since the beginning of 2022, and through the data for the week ending May 27, 2022, there has been no material, sustained decline in trains held per day due to crew or locomotive

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[7] *Kawasaki*, 561 U.S. at 107-08 (the 1978 Carmack amendment increased the ICC's authority over international shipments and undermined COGSA's authority).

[8] UP Reply at 2 (states the ICC "once had broad authority to regulate the terms of arrangements for railroads' use of freight cars").

[9] *Urgent Issues in Freight Rail Serv. – R.R. Reporting*, EP 770 (Sub-No. 1) (STB served June 13, 2022), at 2.

availability for BNSF Railway Company (BNSF), CSX Transportation, Inc. (CSXT), Norfolk Southern Railway Company (NSR), or Union Pacific Railroad Company (UP)."[10] The lack of progress is attributable to the Railroads' pursuit of PSR and lower operating ratios, especially through inadequate hiring and retention.

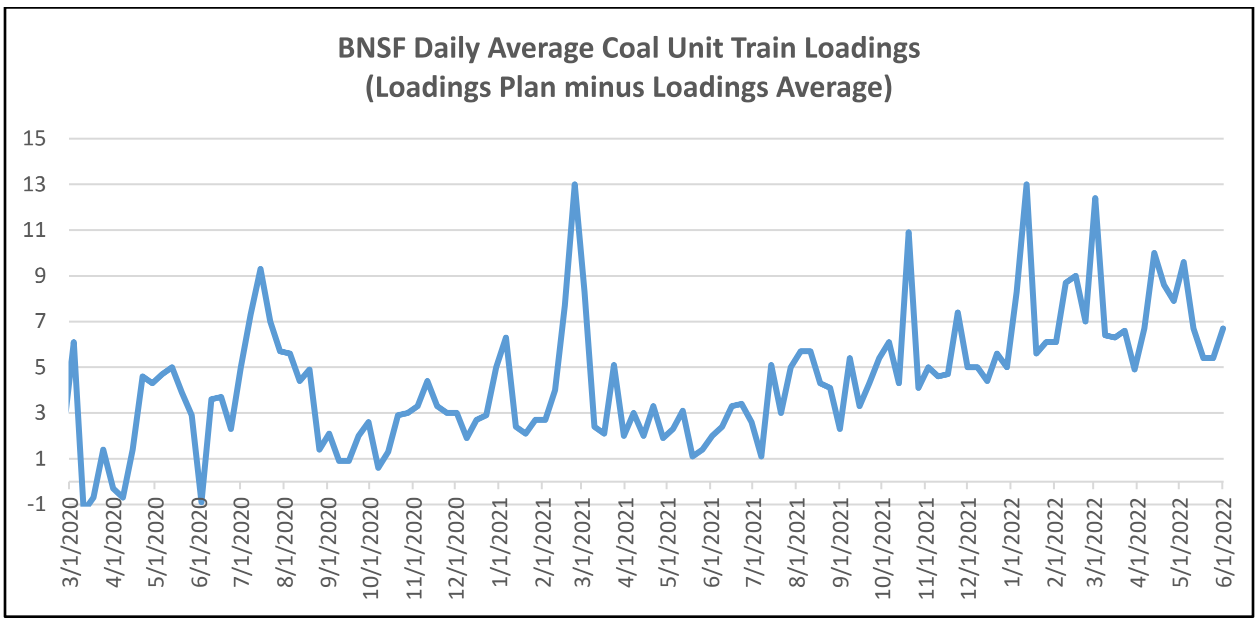
c. The Railroads are Refusing to Deliver Nominated Volumes Consistent with Prior Practice and Agreements

Most rail carriers require their coal customer utilities to provide annual and monthly trainload volume nominations for the purposes of railroad resource and coal mine train load planning. Some carriers have tariff provisions that require that the shipper provide a 30-day rolling forecast. Since around 2000, NCTA has worked with the rail carriers and coal producers to develop an online trainload nomination process that provides annual and monthly trainload nomination service requests by the utilities. This approach is critical for resource planning by both rail carriers and producers for slotting or scheduling trains to be loaded at the mines. Network service disruptions since early 2021 have prevented many utilities from receiving the coal volumes or trainloads that they have submitted in the required nomination process. Missed trainload nominations represent loss of utilization time for private unit train sets that will not be made up if the rail network service issues persist, as they have for many months. A survey of NCTA members which provides data on trainload nominations received and not received for the period July 2021 through December 2021 is attached hereto as **Attachment A**.

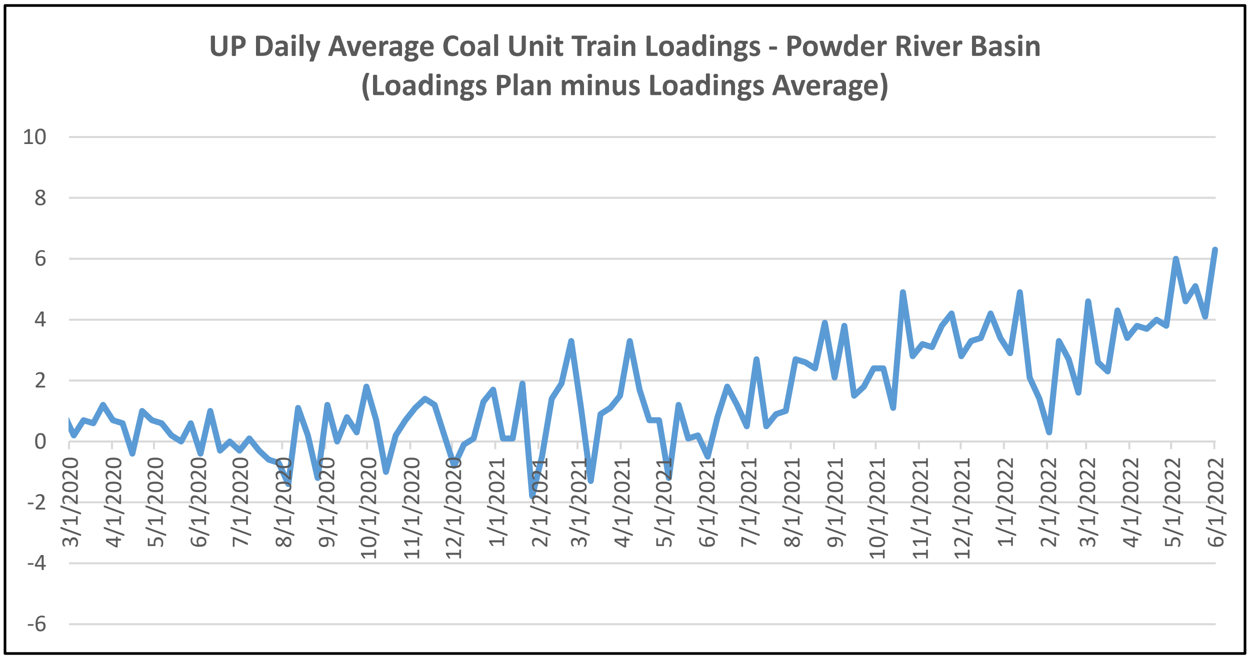
[10] *Id.*

d. The Railroads Have Responded by Ordering Shippers to Remove Private Railcars from the System

The railroads' response to the problems of their own creation is to order shippers to remove trains and cars from the system.[11] The railroads claim this measure is necessary to restore fluidity and will enable them to deliver more volume with fewer trainsets. This approach has not worked, at least not for Coal Shippers. As depicted in the charts below, the gap between actual shipments and planned volumes continues to expand.



[11] Bill Stephens, *UP to begin metering traffic if shippers don't reduce car inventory*, Trains (Apr. 12, 2022), https://www.trains.com/trn/news-reviews/news-wire/union-pacific-to-begin-metering-traffic-if-shippers-dont-reduce-car-inventory/ (noting that UP began with "voluntary efforts," but was also "in daily dialogue with our unit train customers to maintain fluidity and reduce their inventories on our system").



Note that the data reflects only the gap between the railroads' planned versus loaded cars or trains, not the larger amount that shippers nominated or desire to ship.

The railroads should not be allowed to create widespread service problems, order cars off the system to mitigate those problems, and then claim that no car supply problems exist. UP admits in its Reply that the ICC previously "relied on its pre-4R Act authority under 49 U.S.C. § 1(14)(a) to promulgate rules governing railroads' movements of freight cars [] in 1969, in response to a long-standing, nationwide freight car shortage." UP Reply at 4. Similarly, AAR agrees in its Reply with Petitioner that "the Board's car service authority extends . . . to the question whether there are 'sufficient regulatory incentives in place to ensure that there was an adequate national fleet of railroad-owned and privately-owned grain hopper cars.'" AAR Reply at 5. Ironically, AAR and UP reference authorities to support their argument that "Petitioners do not claim the proposed rule is needed to ensure an adequate supply of freight cars." UP Reply at 5; AAR Reply at 5. However, had the railroads not implemented operational changes and PSR and reduced their crew headcounts, rail service and volumes would improve, and rail shippers would again have access to their private railcars.

In summary, the evidence overwhelmingly shows that the railroads have created a service meltdown and have responded to their meltdown by denying shippers access to their train sets and private rail cars. The Board is thus fully justified in intervening to "encourage the . . . efficient use of freight cars."[12] The status quo is unacceptable, and regulatory intervention is necessary to redirect and incentivize the railroads to value the shippers' investment in freight cars.

4. Requiring the Efficient Handling of Private Railcars Will Not Penalize Those Using Carrier Railcars

The proposed rule promoting the efficient use of private railcars will not penalize or punish the carriers or those shippers that use carrier-supplied railcars. Instead, it will produce a level playing field and incent the carriers to operate efficient networks for the benefit of all rail customers. In many instances, railroads forced shippers, including the Coal Shippers, to acquire private railcars in order to increase their captivity and reduce the railroads' own capital burdens. The scrap metal shippers likewise noted in their Reply that they were forced to buy private railcars when the railroads took their cars to use for more profitable shipments.[13] Having extracted those

[12] 49 U.S.C. § 11122(a).

[13] Reply of the Inst. for Scrap Recycling Indus., Inc., *Petition for Rulemaking to Adopt Rules Governing Private Railcar Use by Railroads*, EP 768 (filed Aug. 30, 2021), at 5.

advantages, the railroads should not be allowed to claim that they are unable to provide quality service to those that use railroad-supplied railcars.

The requested regulation will merely incentive railroads to consider the shipper investment in railcars as part of the overall transportation cost. The railroads would prefer to treat such costs as an externality, or cost-free contribution, while they maximize their own profits or minimize their operating ratios. Doing so undermines the overall efficiency of the transportation system.

5. Charges Should be Assessed unless the Carrier Demonstrates it was not at Fault and Does not Charge Demurrage to a Shipper under Similar Conditions

a. A carrier should not be exempt from charges under circumstances equivalent to those where it imposes charges on shippers.

Carriers should be excused from charges for inefficient use of shipper equipment only to the extent that shippers are not charged for demurrage and accessorial services delay under similar circumstances. Specifically, the carrier should have to demonstrate that the delay was due to factors beyond its reasonable control and that it would not, and does not, charge shippers in an equivalent situation.

b. "Due diligence" should also be limited to the extent it is allowed for shippers under similar circumstances.

A "due diligence" exception should not be available to carriers unless a similar provision is included in the tariff and applied to shippers for similar demurrage and accessorial fees. For example, inclement weather should not protect the carrier unless it also protects a shipper that is unable to load or unload within the specified period.

c. If carriers want to hold private freight cars, they need to compensate shippers, regardless of whether the delay would promote "overall efficiency."

The fact or mere possibility that holding private railcars contributes to "overall efficiency" for the railroad should not excuse the railroad from providing compensation for the excessive delay. Whether the delay contributes to "overall efficiency" should, and can, be determined only after compensation for the delay is taken into account. Otherwise, the private car owner or lessee is being required to subsidize railroad operations without compensation. A railroad that is not required to provide compensation will treat the private cars as a zero-cost asset or resource. The lack of compensation thus incents railroads to operate with inadequate personnel and infrastructure because the adverse consequences are borne by the shipper and not the railroad. PSR thus becomes yet another means for the railroads to extract value from shippers by degrading the quality of their services.

d. Carriers currently deny shippers' requests to put private freight cars onto the system so the proposed regulation will not increase congestion.

UP's argument that the proposed rule would "incentivize shippers to deploy inefficiently large fleets"[14] makes no sense and is another effort to divert focus from the railroads' own service inadequacies. Private railcars represent a substantial investment

[14] UP Reply at 13.

for shippers like the Coal Shippers, one that the carriers would prefer to minimize to the extent possible. Service variabilities force shippers to acquire additional railcars for periods when service is inadequate. Shippers suffer a double harm when railroads, such as UP, order shippers to park or otherwise idle trainsets during times of poor service. First, shippers are deprived of the value of their substantial investments. Second, shippers are unable to receive the products, *e.g.,* coal, that they desperately need, and are forced to acquire high-priced substitutes (natural gas and purchased power) and/or forego sales, and are also unable to maximize use of their power-generation assets. Railroad efforts to blame shippers for excessive railcar fleets represent an attempt to divert responsibility for problems that are entirely of the railroads' own creation.

6. The Proposed Regulations will Incentivize the Railroad to Make Necessary Changes to Promote Rail Network Efficiency

Railroad claims that avoiding delays of private railcars will disrupt operations and cause inefficiencies rest on an overly narrow view of railroad operations and service. Efficiency should be measured not on avoiding cost, but on serving customers efficiently and appropriately. As explained *supra*, private railcars should be viewed not as a zero-cost resource, but as a customer contribution that should be treated and recognized as providing value. Private railcars should not be treated as an excuse to avoid hiring and retaining adequate staffing or infrastructure. Likewise, bunching and operational delays should be viewed as matters that degrade the value and operation of the network. When an item represents an "inefficiency" for the railroad it should be viewed not in terms of merely whether it entails a cost, but also whether it confers value for the customer.

Similarly, in determining whether doubled coal and other trains promote overall efficiency, the analysis should not be limited to train crew savings, but should also take into the delays associated with assembling and then separating doubled trains and the destination bunching that the Coal Shippers are experiencing with increasing frequency. To the extent that such operations inflict train holds and delays on shippers, the railroads should be required to compensate shippers for those delays. Otherwise, overall efficiency will be measured only in terms of the railroads' internal costs, not in terms of overall operation of the transportation system. The railroads should certainly not be able to use delays such as origin bunching as a means of extracting additional fees on shippers as part of their poor service.

7. The Proposed Rule should be Amended so that Charges are Assessed if Private Rail Cars are Held Continuously for more than 24 hours and when Unit Train Private Car Trainsets are Held Cumulatively for More Than 72 hours per Round Trip.

Coal shippers become subject to demurrage charges after a delay of just 24 hours, and the same standard should apply when railroads hold private railcars, so that reciprocity applies. For example, BNSF demurrage book 6004-C provides 21 pages of detailed descriptions that shippers must decipher on how the railroad determines demurrage charges. The default timeframe beyond which BNSF can charge demurrage at a rate of $600/hour begins at 24 hours. Railroads should be held to the same standard, especially as they have significantly more control over the scheduling of trains. Shippers must always be ready to receive trains. Even when carriers are off significantly from the estimated time of arrival, the shipper must still unload and turn the train within 24 hours or face demurrage penalties.

Charges should also apply when unit train trainsets of private cars are held at multiple locations, when the delay at any single location is greater than ten (10) hours and total of such delays exceeds 72 hours. As noted *supra*, the Coal Shippers seldom experience delays at a single location that exceeds 72 hours, but often experience multiple delays that exceeds 10 hours at a single location and 72 hours in total. A unit train, often exceeding 100 cars for Coal Shippers, represents a massive investment. Relief should be available when the delays are spread out over multiple locations, and not be limited to a single location.

CLM Event Sighting Codes are appropriate for determining when private railcars are held, and the fact that the railroads maintain and rely on this data may minimize potential disputes. That said, the CLM codes for "held" must be supplemented. In particular, the interval between (a) release or interchange, if the delay at interchange is unreasonable, and (b) departure must also be counted as idle time. As such, the timeframe should begin from the time the railcars are received in interchange or when the cars are released by the coal shipper or the mine. This is because if private railcars are to be used efficiently, the carriers need to pick up the trains as scheduled.

8. The Board Should Assess Charges under the Proposed Regulations Based on the Carrier's Demurrage and/or Accessorial Fees

The Shipper Groups encourage the Board to base the fee levels for private railcar delays on the fees that the railroads establish for demurrage and accessorial charges. Such feel levels will provide the railroads with what they consider to be appropriate incentives (at least as applied to shippers) for efficient handling of trains. However, the charges will not compensate shippers for the value lost by not receiving their freight on time and sometimes not at all. For example, a utility coal shipper that experiences a 30% increase in cycle times due to train delays and is not allowed to deploy additional trainsets to make up for the delays, will experience a net shortfall in coal deliveries. That shipper may have to resort to generating power from natural gas instead at three or more times the delivered cost of coal.

9. Railroads should be Responsible for Tracking and Invoicing all Charges

CLM Event Sighting Codes are an appropriate data source for tracking delays of private railcars and preparing charge invoices. Since the Class I carriers already generate invoices to shippers for demurrage and accessorial fees utilizing the CLM Event Sighting Codes, the carriers can and should be required to utilize the same data to apply to railroad delays and prepare penalty invoices and calculate offset charges as necessary. Where the penalties are greater than the demurrage and accessorial fees, the shipper should be compensated accordingly on a semi-annual or quarterly basis.

IV.
CONCLUSION

For the reasons stated, the Shipper Groups respectfully request the Board exercise its regulatory authority and proceed with a rulemaking to adopt regulations that will incentivize the efficient handling of private railcars.

Respectfully submitted,

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Dated: June 30, 2022

ATTACHMENT A

Attachment to Written Comments in Response to:

Docket No. EP 768 *Petition for Rulemaking to Adopt Rules Governing Private Railcar Use by Railroads*

Submitted by

National Coal Transportation Association

June 30, 2022

Utility On time Performance (OTP) Metric Survey

The following data from the fourth Utility On Time Performance (OTP) Survey covers July 2021 through December 2021 and represents responses from 28 plants that ship coal in the United States on the Union Pacific Railroad, BNSF Railway and the Norfolk Southern. Coal Supply regions represented in the data include, the Southern Powder River Basin (SPRB), and Northern Powder River Basin (NPRB), Rockies, Northern Appalachia (NAPP), Central Appalachia (CAPP) and Illinois Basin (ILB):

The utilities that responded to the survey reported the following:

- 92% reported rail service issues that have impacted their company's coal transportation.
- 60% reporting railroad service as worse than it was in 2019 and 2020.
- 64% of those respondents also reporting that their company had to modify its operations in the second half of 2021 because of railroad service issues, disruptions, and delays.

Utilities responded to specific questions about how their operations have been impacted by railroad service issues:

Answer Choices	Responses	
No issues. Service has been about the same as usual	0.00%	0
Railroad service has been deteriorating for several months	58.33%	7
Coal Inventory stockpiles reduced below target levels	83.33%	10
Coal Unit Curtailment efforts were necessary to conserve coal supply	58.33%	7
Coal supply commitments for the year were not met	50.00%	6
Rail car maintenance was impacted due to loss of time	50.00%	6
Force Majeure declared	8.33%	1
Restricted from adding more train sets by the railroads	50.00%	6
Train sets had to be parked as mandated by the railroads	16.67%	2
Additional trains or leases were necessary to make up deliveries	25.00%	3

Costs

Of those utilities that responded, over 90% reported that railroad service issues have increased costs for their utility. The utilities were asked how much do they estimate that railroad service issues in 2021 have increased costs in general for their company.

- 30% of the utilities reported cost increases of between $100,000 and $ 1 M.
- 50% reported cost increases of between $1 M and $10 M.
- 20% reported cost increases of over $10 M to $20 M.

The utilities were asked what specifically they attribute these cost increases to:

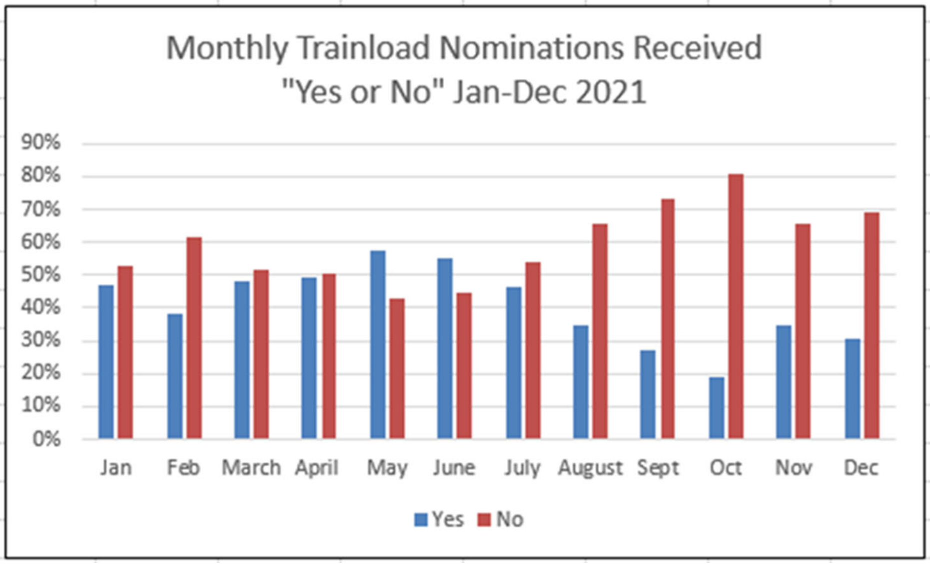
Answer Choices	Responses	
Extra costs for purchase power to replace coal generation	50.00%	5
Extra costs for natural gas to replace coal generation	40.00%	4
Additional train leases were necessary to make up deliveries	30.00%	3
Increased labor costs at your company to manage inventory or other production issues	70.00%	7
Had to make spot purchases of coal from other mines because railroads could not deliver from contracted mine sources	30.00%	3
Other	20.00%	2

The utilities were also asked what type of railroad service issues they experienced:

Answer Choices	Responses	
Longer transit times	75.00%	9
Lack of railroad crews causing delays	91.67%	11
Delayed train pick ups	66.67%	8
Trains being doubled in transit	58.33%	7
Lack of locomotive power	75.00%	9
Poor communication	50.00%	6
Missed car switches	33.33%	4
Increased charges by the railroads	25.00%	3
Other (please specify)	16.67%	2

Nominations:

The chart below shows the utilities that participated in the survey for the January through July 2021 period combined with the *Utility OTP Metric Survey* results covering July through December 2021 and shows the percentage of nominated trainloads received by plants and not received.



The chart below represent the group of plants shipping coal from the SPRB coal region reporting the percentage of forecasted trainload nominations received as equal to, 10% better, 10% worse, 20% worse and 30% worse than their forecast nominated trainloads.

SPRB Plants (16)	Equal to	10% Better	10% Worse	20% Worse	30% Worse
July	31%	6%	19%	25%	19%
Aug	38%	6%	19%	6%	31%
Sept	6%	6%	44%	19%	19%
Oct	6%	6%	50%	6%	31%
Nov	25%	6%	13%	44%	13%
Dec	19%	6%	25%	38%	13%

The chart below represents the group of plants shipping coal from the NPRB coal regions:

NPRB Plants (4)	Equal to	10% Worse	20% Worse	30% Worse
July	50%	50%	0%	0%
Aug	25%	25%	25%	25%
Sept	50%	25%	25%	0%
Oct	25%	0%	75%	0%
Nov	0%	50%	50%	0%
Dec	25%	25%	0%	50%

The chart below represents the group of plants shipping coal from the ILB coal regions:

ILB Plants (4)	Equal to	10% Worse	20% Worse	30% Worse
July	50%	0%	0%	50%
Aug	0%	25%	0%	75%
Sept	0%	0%	0%	50%
Oct	0%	0%	0%	75%
Nov	0%	0%	25%	75%
Dec	0%	0%	0%	100%

Two plants shipping coal from the Rockies reported their forecasted nominations received as the following:

Rockies (2)	July	Aug	Sept	Oct	Nov	Dec
Plant A	20% Worse	20% Worse	Equal to	Equal to	30% Worse	30% Worse
Plant B	Equal to	10% Worse	10% Worse	20% Worse	20% Worse	20% Worse

One plant shipping coal from NAPP reported its forecast nomination as 30% worse than forecasted for July, August, September, October, and December and equal to its forecast in November 2021.

Comments from Shippers:

Along with the plant forecasted trainload nominations received questions, the survey also collected comments from shippers about their respective experiences with the carriers over the six-month period July through December 2021. Some of those comments are listed below.

1. Railroads seem to be worried about velocity and reducing set count on their systems. Unfortunately, even if you gain velocity and reduce equipment it still takes the same amount of crews to move forecasted coal and they all seem to be short
2. The number of permits (trainload nominations) would have been higher however the railroad elected to park half of my rail fleet which reduced the number of permits they could satisfy

3. Service issues related to locomotive power problems and lack of crews have been ongoing for several months.
4. Lack of crews may be the biggest issue, our railroad will leave an unloaded train on our site for up to 2-3 days until another set is unloaded, then they send a crew to double the trains and depart.
5. Communication was terrible.
6. Even though our railroad service was not great in 2021, our communication with the railroads was great. They were all forthcoming with their challenges, even giving us frequent updates on their efforts to hire new staff and get them trained. We could tell they were doing the best they could and were prioritizing our shipments over other traffic.
7. Increased bunching of trains caused us to incur costs to add coal to our stockpile and then pull coal off our stockpile more than in the past.
8. All 4 major providers had issues with crews, power and communication in 2021. Reduction in employees that worked the 24 hour desks resulted in terrible communication and lack of crews kept trains sitting.