North America Freight Car Association

Promoting the interests of Railcar Builders, Owners, Lessors and Lessees since 1993

October 2023

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The NAFCA Success Story

The history of the US railroad industry has often been marked by the inadequacy of railroad freight car fleets to fill shipper requirements. From its earliest days the Interstate Commerce Commission undertook proceedings to improve the distribution of freight cars so that shippers had access to cars where they were needed, when they were needed.

Over the course of time, particularly since enactment of the Staggers Rail Act of 1980, railroads have encouraged shippers to acquire and supply their own equipment as the railroads focused their investments on locomotives and infrastructure. This has resulted today in railroads supplying only one-third of all current hopper cars used for agricultural commodities, chemicals and plastics, and no tank cars whatsoever. Overall, the railroads contribute less than 25% of the National railcar fleet.

More than a decade ago researchers found that private cars, e.g., those not owned by railroads, carried 54 percent of ton-miles and 56 percent of tonnage moved by railroad and accounted for 46 percent of railroad revenue. Those numbers have increased as railroad fleets have continued to shrink. The researchers also found that private car owners make 87 percent of total new investments in railroad cars, without which railroads would be unable to function efficiently and economically.

The maturation of the privately owned rail car industry has resulted in an extensive shift in risk where private car owners are dependent upon a series of compensation regimes to ensure an adequate supply of cars to meet demand. The rise of these mechanisms and the attendant issues inherent in this system have given rise to the need for strong, collective private car owner representation, a role proudly filled since 1993 by NAFCA.

NAFCA primarily consists of manufacturers, lessors, and lessees of privately marked

rail cars.[1] Equipment owned and operated by NAFCA members operate in 49 states and throughout Canada and Mexico. NAFCA members provide tens of thousands of well-paying jobs supporting the livelihoods of hundreds of thousands of workers in farming and manufacturing by providing the rail cars necessary for raw materials and processed goods to reach their ultimate consumers. NAFCA currently has 39 members who represent 800,149 private railcars.

NAFCA's membership is dedicated to promoting the safe, efficient, and economical use of private rail cars. Its primary goal is to secure the establishment and maintenance of reasonable, equitable and lawful practices and rules affecting the use of, repair of, operation of, and principles of compensation for all private rail cars. Thus, our work has focused on areas where we can work together to find ways to improve the safe operation of private rail equipment while protecting the interests of our members. Where NAFCA is unable to find a solution through negotiation or participation in policy and regulatory initiatives, NAFCA will not hesitate to take the lead in protecting the interests of its members through litigation and legislation.

NAFCA has negotiated numerous issues with the railroads and has reached some successful conclusions, either through those negotiations or litigation in the event those negotiations have not been successful. In those cases where negotiation failed to bring about a resolution satisfactory to the NAFCA membership, NAFCA has filed complaints with the Surface Transportation Board (STB) or in Federal Court in order to protect the interests of its members.

NAFCA's efforts to advance the interests of its members through litigation, regulatory policy, and legislative advocacy are assisted by its outside counsel (Tom Wilcox, Law Office of Thomas W. Wilcox, LLC in Washington, D.C.), its Washington Representative (Ed Merlis), and railroad industry experts within and outside of NAFCA.

This document represents a compendium of some of NAFCA's major accomplishments going back to 1993.

[1] NAFCA's membership also includes companies that service the private railcar industry, which are admitted as Associate Members.

Economic Issues

Fixing the OT-5 Loading Authority Problem – Introducing OT-57

OT-5 is the AAR Circular for *Rules Governing Assignment of Reporting Marks and Mechanical Designations*. Before any privately marked railcar is permitted on the North American rail network, OT-5 Loading Authority must be granted by the railroads upon which the railcar will be moved. Although the circular has been around since 1962, in recent years it has become a significant challenge for shippers.

In 2008 an on-line OT-5 application and approval process was implemented, triggering a series of problems including excessive delays in approval and applications being rejected for failure to list the commodity to be hauled, all loading locations, and not having an OT-5 application approved for each car placed in service. Ironically, none of these are valid reasons for denying OT-5 Loading Authority as there are only three reasons loading authority can be rejected: if the cars do not meet safety standards, mechanical standards or if the requesting party has inadequate storage space for the equipment.

Car owners' concerns that arose after 2008 appeared to stem from two factors; rail carriers more strictly verifying and penalizing shippers when records were not complete, and data screens requiring extraneous information neither necessary nor relevant to the granting of loading authority. Because rail carriers were more strictly analyzing, verifying, and penalizing shippers when records were not complete, shippers faced significant shipping delays and significant monthly penalty charges from the railroads.

As a result of this continuing problem, e.g., loading authority being denied on bases other than safety or mechanical factors, or storage space, NAFCA requested that AAR resolve the disparities between denial (and fines) and the OT-5 rules themselves. AAR and its Class I carriers agreed to review the issues and a set of meetings was arranged with NAFCA members to address the shippers' concerns.

These meetings resulted in a joint NAFCA-AAR agreement that the OT-5 application and approval process was not working and that a new system was needed. NAFCA's team assiduously pursued the establishment of a new system that resulted in the adoption of a new Circular, OT-57 effective January 1, 2020, and the elimination of private car registration and approval as part of the OT-5 process on February 1, 2020.

The new Circular has resulted in:

- Railroads no longer approving private cars for loading,
- Mechanical data no longer being reviewed as part of the registration process,
- Commodity and Loading point information no longer being required.

Key information required in the new system is limited to:

- Car initial and number,
- Primary and Secondary Contact Name, Number and E-mail,
- Valid Storage location(s).

The new OT-57 System provides that once car information has been submitted cars not otherwise found to be mechanically unfit to operate will be able to operate on all carriers within North America without seeking any approval from any carrier. After programming was completed, OT-57 was implemented on December 12, 2019, for controlling entities to begin registering private cars in the new system, following which OT-57 was fully implemented and effective on February 1, 2020.

There have been only positive impacts from the implementation of OT-57. NAFCA's efforts have and will continue to save car owners millions of dollars per year in reduced fines and excessive labor costs in managing and operating their private railcar fleets.

Petition to Adopt Rules Governing Private Railcar Use by Railroads

In 2021, NAFCA led a coalition of organizations whose members own or use private railcars in petitioning the STB to adopt rules to incentivize the Class I railroads to utilize private railcars more efficiently. The petition, which was docketed in STB No. EP 768, seeks adoption of regulations enabling private railcar providers to assess a "private railcar delay charge" if a railroad exceeded an "allowable transit idle time," of seventy-two (72) consecutive hours of idle time at any point on a railroad's system while the private loaded or empty railcar is being transported under a bill of lading or similar documentation between the time the private railcar is released for transportation to when it is either constructively placed or actually placed at the private railcar providers facility or designated location.

The STB has accepted the petition for rulemaking and issued a decision seeking public comments on several questions involving private railcar use and the components of the proposal. The opening comment period concluded June 30, 2022, with reply comments filed by September 8, 2022. The ideal next step is for the STB to issue a notice of proposed rulemaking that leads to final ruled adopting the NAFCA proposal or some other appropriate mechanism to incentivize more efficient private railcar use. While we still await final STB action, the prompt consideration for the petition for rulemaking suggests that the Board will resolve this issue in the near future.

NAFCA et al vs. Union Pacific Railroad Company (NOR 42144)

In 2015 NAFCA led several trade associations and individual tank car owners in filing a complaint against the Union Pacific Railroad seeking mileage allowances on shipments using private tank cars. UP does not pay mileage allowances on tank car shipments – such shipments move under so-called "zero- mileage" rates where, pursuant to a contract or tariff, UP does not pay mileage allowances to the car owner or car lessee in exchange for UP's use

of their private tank cars. UP does not offer an alternative to zero-mileage rates that provides the Complainants with the option to receive mileage allowance payments.

Around the time NAFCA and its co-complainants filed the complaint, the owners and shipper's costs attributable to UP' s use of private tank cars, was exacerbated by UP' s adoption of Tariff UP 6004, Item 55-C, effective January 1, 2015 which shifted the cost of transporting empty tank cars to and from repair facilities from UP to private tank cars providers, without compensating them for UP's use of their cars.

Over the last seven years extensive briefing has been conducted by the Surface Transportation Board, and we are awaiting a favorable outcome.

AAR "Truck Hunting" Standards Litigation

In 2012 NAFCA filed a formal complaint with the STB against the Association of American Railroads (AAR) and its Class I railroad members over the AAR's publication of tighter tolerances for "truck hunting" by rail car wheels. The basis for the complaint was that AAR sought to implement the tighter standards with no regard to balancing the costs of compliance against the benefits received, and with no regard for sharing the costs and benefits between railroads and the entities who supplied them railcars.

Specifically, a more restrictive tolerance for truck hunting was prescribed by AAR even though there was no meaningful safety benefit to be derived by the new tolerance. To the extent there was any benefit, it was clearly shown to accrue exclusively to AAR's members through increased speed of trains, reduced fuel burn and reduced track maintenance costs. Notwithstanding the foregoing, most of the costs of the proposed new tolerance would have been borne by owners of privately marked rail cars that make up the majority of the rail cars in North America.

When NAFCA filed its complaint, the AAR responded by initiating discussions with NAFCA to reach a commercial settlement of the dispute. NAFCA and a subset of its car owner members who serve on AAR committees then spent the better part of a year negotiating alternative changes to the AAR Interchange Rules that would consider the costs and benefits of a proposed change, as well as cost sharing and overall transparency.

Under the settlement the AAR agreed to publish new industry rules and regulations regarding cost benefit analysis and cost sharing on implementation of new rules. The NAFCA/AAR settlement resulted in the following new AAR rules being implemented:

A. Cost Benefit Analysis (CBA) is now required when:
   1. the cost to implement a revision exceeds $5.0 million in calendar year, or $50 million net present value over 15 years, or
   2. Upon written request of any member of the AAR Committee sponsoring the proposal.

B. Implementation of Interchange Rule Revisions

1. Rule revisions can only be implemented when:
    - Aggregate benefits exceed 75% of the cost of implementation and total Equipment Maintenance Improvement benefit is at least 65% of the cost, or
    - Total Safety benefit is at least 30% of the cost, or combined Equipment and Safety benefit is at least 65% of the cost.

2. If thresholds are not met:
    - Implementation of a new rule is not allowed unless,
    - AAR and the Associates Advisory Board's Car Owner Committee agree to funding of implementation.

C. CBA is not required for:

1. Product defects or when there is no cost impact on private car owners,
2. Car Repair Billing Rates,
3. Billing Repair Data Requirements,
4. Editorial changes,
5. Rules mandated by Government regulation.

D. The settlement also created an appeal procedure in place for the CBA process

Under the new AAR Rules, private car owners (including NAFCA members) will no longer be subject to AAR implementation of new rules and regulations without regard to a sharing of cost vs benefits received. It is likely that this will result in significant cost savings for private car owners in coming years.

The parties also agreed to meet and confer once a year to talk about rail car issues. These meetings have helped to identify and resolve other disputes.

Denial of OT-5 Authority on Rail Cars that meet FRA/AAR Standards and Safety Regulations

In 2006, the Union Pacific Railroad (UP) denied OT-5 authority on private cars that were upgraded under the provisions of AAR S-259 (which allowed cars to be loaded up to 286,000 lbs.). However, UP continued to move its own cars that were in compliance with AAR S-259, NAFCA asked the STB to issue a declaratory order to remove the uncertainty created by UP's actions regarding the applicability to all railroads of AAR mechanical standards for use and interchange of cars.

Although the STB eventually denied the petition and ruled that the controversy was one that involved complicated factual circumstances more appropriately addressed in a formal complaint proceeding, the Board also indicated that a declaratory order proceeding is not intended to deal with the level of discovery and evidence needed to build a record upon

which the Board could base a decision. In addition, the Board indicated that if in the future petitioners want a Board determination in a case that could contain a request for damages or for an order that the rail carrier take specific actions, they may file a formal complaint addressing their concerns and requesting relief.

NAFCA and the UP eventually worked out their differences and the UP stopped denying OT-5 authority on AAR S-259 upgraded cars.

BNSF Private Rail Car Storage Charge Litigation

In 2001, NAFCA filed a complaint with the STB against the BNSF Railway (BNSF), which had begun charging storage on empty private rail cars sitting on railroad property. It was NAFCA's position that no railroad had ever charged storage for private cars sitting on railroad property while waiting to load, just as the railroads do not charge storage on system cars waiting to load.

The NAFCA complaint was supported by the National Industrial Transportation League (NITL) and the American Chemistry Council (ACC). The case was before the STB for an inordinate amount of time, and the STB did not issue a ruling for five years. While the ruling favored the BNSF, NAFCA members saved millions of dollars as all other Class I carriers held off publishing similar tariffs charging storage of private cars on railroad property while the case was pending at the STB.

UP "Dirty" Car Litigation

In 2010, NAFCA filed a formal complaint with the STB against UP alleging that provisions of Item 200-A of UP's Freight Tariff 6004 Series constituted unreasonable practices and violations of UP's common carrier obligation. Pursuant to this Item, UP proposed to charge for releasing cars from a shipper's facility that were "dirty" and placed liability on the shipper for cars that were determined by UP to be "dirty" enroute.

The STB eventually issued a decision agreeing with NAFCA that the portion of the UP tariff which assessed a surcharge for lading residue found after a car had left the customer's facility and begun moving in line-haul service was unreasonable.

However, the STB found other portions of the UP tariff, which assessed a surcharge for a shipper's failure to remove lading residue from railcars, were not unreasonable. The STB concluded that lading residue on railcars poses a safety risk and that UP's tariff was meant to help address the associated safety hazards and operational disruptions.

The STB also found that (1) payment of a surcharge by a shipper does not absolve the shipper of liability that would otherwise apply in the event of a loss; and (2) acceptance by UP of a car with lading residue does not constitute a waiver by UP of any defenses it may have in a later civil lawsuit.

While NAFCA members remain concerned that this provision could "shift" liability from UP to a shipper in a civil suit, the reality is that liability must be determined without regard to this tariff.

Two Wear and Class D Wheels

In June 2014, NAFCA members, concerned that certain rail carriers were requiring the installation of new two wear wheels on private cars while saving the less costly turned wheels for use on their own equipment, met with representatives of the Canadian National Railway (CN) to discuss this issue. After reviewing all the appropriate data NAFCA developed the following position:

- NAFCA supports application of two wear wheels on private cars contingent upon:
  (1) an industry-wide requirement for equitable use of new vs turned wheels,
  (2) objective and measurable standards being developed and codified, and
  (3) a penalty being established for not meeting standards.

- NAFCA does not support the application of Class D wheels.

- The AAR should continue to monitor and assess the application of 2 Wear Wheels.

AAR Labor Rate Negotiation

NAFCA maintains anti-trust immunity pursuant to 49 U.S.C. §10706 which allows it to negotiate labor rates on behalf of its membership. NAFCA has performed a study comparing AAR labor rates to independent car shop labor rates and successfully negotiated with AAR to obtain a reduction in AAR labor rates.

"Pickle" Depreciation

NAFCA has been advocating, as part of Federal tax reform, the repeal of the so-called "Pickle" depreciation rules on U.S.-owned railroad equipment used predominately outside the U.S. or leased to non-U.S. taxpayers. This property is subject to straight-line depreciation over 15 years instead of the more valuable "MACRS" accelerated depreciation (200% DB over 7 years). The Pickle depreciation rules were designed to prevent the export of U.S. tax savings. However the adoption of the U.S. – Mexico – Canada Agreement (USMCA)
the resultant free flow of commerce between the U.S., Canada, and Mexico, has rendered the rules' applicability to transportation assets an outdated and costly burden on rail car lessors.

De-Prescription

Until 1993, car hire rates, on railroad marked freight cars, were based on a formula,

prescribed by the Interstate Commerce Commission, intended to compensate a car owner for the cost of ownership and a fair return on its investment. After the Class I railroads claimed that the formula was flawed, the Surface Transportation Board's predecessor agency, the Interstate Commerce Commission (ICC) repealed the formula-based system and adopted a market-based approach of setting car hire rates.

Under de-prescription, a newly built rail car is assigned a default rate, which is the lowest negotiated positive rate in effect for that car type during the previous quarter – a starting point which is non-compensatory. In order to earn a fair rate of return, a freight car owner must negotiate a bilateral compensation agreement with every railroad that would handle that car; failure to negotiate such a rate successfully can only be remedied by a defective, baseball style arbitration system in which the incentives are tilted against lessors.

When capital tightens across the rail industry, de-prescription's failure to provide investors with an adequate return on their investments erodes the sustainability of the freight car fleet and reduces the ability of lessors to earn a fair and equitable time and mileage rate, thus reducing investment in the pool of high-quality freight cars.

There is ample evidence to this effect, particularly with boxcars, one of the car types most likely to be deployed on car hire based leases. Since the beginning of the century, the North American boxcar population has declined from 224,000 to roughly 120,000 cars. One of the most significant factors contributing to this decline is the failure of de-prescription to allow for fair compensation of these assets. Unless de-prescription is fixed along the lines advocated by NAFCA, the long-term availability of boxcars will be significantly reduced, necessitating that shippers protect their supply chains by shifting boxcar traffic to trucks.

Mileage Equalization

NAFCA fought on behalf of its members to rectify inequities brought about by the misapplication of mileage equalization by working closely with the AAR. Railroads and shippers have operated tank cars since the 1980's under the threshold of 106% of loaded miles to empty miles as per the findings of Ex. Parte 328. The application of Ex. Parte 328 can be found in the provisions of Tariff RIC 6007 Series. NAFCA members became concerned about a misinterpretation of the provisions found in Item 187 and Item 190 of Tariff RIC 6007 which was affecting the 106% threshold and causing tank car owners and lessees to pay more in penalties than is appropriate.

The intent of the tariff is clear that tank car owners should not be charged for excess mileage when the carriers fail to use the reverse route of the initial shipment. We argued that various carriers followed directional running, various routing protocols and some circuitous routing that increased the number of miles traveled by private equipment. We also argued that carriers are continually routing cars back to origin via a route other than the reverse route. Departures from the reverse routes were causing substantial excess mileages to accrue against the tank car owner for which the erring railroad does not make the appropriate

mileage adjustment.

Carriers had become accustomed to interpreting a departure from the reverse route requirement as a departure for "railroad convenience" under Item 187 for which they do not have to make a mileage adjustment. We firmly believe this to be an incorrect application of the rule and in direct violation of the provisions of Item 190.

We also believe that excess miles are being charged by some rail carriers, for movements to shops for DOT, FRA or AAR mandated retrofit programs, inspections, or repairs. These additional miles should also be excluded from excess mileage calculation as is clearly provided in Item 187 (3).

The misapplication of the rules found in Item 187 and Item 190 of Tariff RIC 6007-Series is causing a financial burden to be placed upon tank car owners and lessees. Those tank car owners and lessees are being asked to pay mileage equalization penalties due to the erring carriers not making the appropriate mileage adjustments.

SAFETY ISSUES

Reflectorization

The final rule for the reflectorization of rail freight rolling stock, which requires that all freight cars have reflectorized sheeting placed on every railcar, went into effect on November 28, 2005. The rules required that reflective sheeting must be replaced every 10 years making November 28, 2015, the replacement deadline for all initially applied retroreflective materials on rail freight rolling stock.

The AAR petitioned the Federal Railroad Administration (FRA) in September 2015 for a waiver from compliance with several provisions of the Federal railroad safety regulations contained at 49 CFR part 224, Reflectorization of Rail Freight Rolling Stock. In particular, the AAR sought a waiver from compliance with the *Renewal provision,* which requires retroreflective sheeting to be replaced with new sheeting no later than 10 years after the date of initial installation, regardless of the sheeting's condition.

In its waiver petition, AAR noted testing and evaluation conducted by the Texas A&M Transportation Institute (TTI) of reflective sheeting on 920 freight cars and 120 locomotives in service and found that much of the material tested meets or exceeds the requirements contained in the regulation. Specifically, TTI found that the FRA-224 stamped material demonstrated, after more than 9 years in service, that it was in good condition and could remain in service if properly maintained. AAR's petition sought to permit well-performing FRA-224 stamped material to remain in service and to be evaluated using a performance-based approach such as the Federal Highway Administration's Comparison Panel Method or a performance-based method such as a hand-held device similar to the type that AAR and TTI used during testing and evaluation. AAR requested a waiver to extend the renewal

requirement for at least 3 years while work on a performance-based evaluation procedure is completed.

Comments in support of the waiver were filed by NAFCA, Colorado Springs Utilities, Railway Supply Institute, and National Coal Transportation Association. No comments were filed in opposition to the waiver request.

FRA granted a waiver for railroad rolling stock owned or operated by AAR members from the provisions of 49 CFR 244.111 for a period of 3 years, from November 28, 2015, to November 27, 2018. During this time AAR members are to replace grandfathered retroreflective material at the earliest single car brake test or annual locomotive inspections regardless of material condition.

NAFCA submitted comments expressing its concern that the waiver as written was limited to cars owned or operated by AAR members. NAFCA has and continues to be involved in monitoring this issue and supports the most recent issuance by the FRA of guidance permitting the use of a performance-based method (comparator panels) to determine when to replace reflectorization sheeting.

PHMSA HM-251 Tank Car Regulations

NAFCA participated extensively in the PHMSA Rulemaking that prescribed requirements for tank cars built for flammable liquid service and has on a continuing basis provided the membership with details of the continuing refinement of the regulations. Although the Final Rule was initially issued in May 2015, legislation enacted in December 2015, Transport Canada modifications adopted in July 2016, and further proposed rulemaking issued in August 2016 necessitate that shipper of flammable liquids be consistently updated as to the phase out dates for DOT-111 and CPC-1232 tank cars in different commodity services, as well as the changing requirements for DOT-117R tank cars.

Additional Benefits of NAFCA Membership

Voting Membership on AAR Committees

AAR technical and car service committees are comprised of railroad members and representatives of the AAR's Associate Member program. NAFCA has worked closely with the lessor members of the AAR Associate Member program to establish a Car Owners group within the AAR.

Regulatory and Legislative Advocacy

With the assistance of Messrs. Wilcox and Merlis NAFCA advocates policy positions on behalf of its members before Congress, STB, FRA, PHMSA, AAR and individual railroads on

issues that are important to the private railcar industry and NAFCA members. Some of the issues for which we have advocated for the private railcar industry are:

- Rule 91 service interruptions,
- Railroad carpools,
- Rail car registration and regulations,
- Pre-emption of Federal Law contained in H.R. 1401 (In 2007 H.R. 1401 contained a provision that would undermine the preemption of state and local laws that presently attach to federal rail safety jurisdiction. The provision, if enacted, would permit the application of state law to resolve disputes regarding rail service even where such disputes involve the application of federal regulations.)

Access to Congressmen and Senators

Our Washington Representative Ed Merlis provides valuable information to the NAFCA membership regarding legislative actions taking place in Washington. In addition, he is available to take NAFCA members around Capitol Hill when they are in Washington to meet with Senators or Congressmen. His extensive contacts in Washington have proved to be very valuable for NAFCA and the NAFCA membership.

Technical, Regulatory and Compliance Issues

NAFCA continually provides information to the membership concerning technical and compliance issues related to private rail cars, the operation of private cars, changes in AAR interchange rules and regulations and current news relating to STB, AAR, FRA and other regulatory agency rules and regulations. On regulatory and agency policy matters, NAFCA's counsel Tom Wilcox has been involved in virtually all aspects of railroad transportation law for over 25 years and is available to provide detailed analysis and advice to the membership on proposed and new rules and regulations governing rail cars and rail transportation.

Access to Industry Experts and Industry Peers

The NAFCA membership is made up of numerous industry experts and transportation executives. NAFCA members have opportunities to hear from and learn from the experts in numerous fields, some of whom sit on various AAR committees and keep the NAFCA membership updated on important issues.

Monitoring of Industry Issues

NAFCA regularly monitors industry issues and keeps its members informed on all issues that affect the ownership and interests of private railcar owners and operators.

Monthly Report

NAFCA publishes a monthly report on important issues relative to the transportation and private railcar industry.