

Thursday, July 18, 2019

Chairman Ann D. Begeman
Vice Chairman Patrick J. Fuchs
Board Member Martin J. Oberman
Surface Transportation Board
395 E Street SW
Washington, D.C. 20423

Chairman Begeman, Vice Chairman Fuchs and Board Member Oberman,

On behalf of the Railway Supply Institute's (RSI) Equipment Leasing Committee (ELC), I would like to extend our gratitude for the opportunity to meet with each of you and your respective staff members recently to talk about the importance of private investment in rail assets, including the \$40 billion dollars invested into the nation's railcar fleet since 2008 alone. We also appreciated the chance to discuss RSI's concern about the default rate rule set forth in the AAR Code of Car Hire Rules.

The default rate rule provides that a railcar carrying a railroad mark that does not have a negotiated or arbitrated per diem rate will be assigned a "default rate equal to the lowest negotiated positive rate in effect for that equipment type at the end of the previous quarter." This default rate is used to determine applicable per diem charges for each railcar unless a specific market rate is established through negotiation or arbitration. As we explained during our meetings, the members of RSI's ELC and numerous rail shippers and short line railroads have concluded that the default rate rule set forth in the AAR Code of Car Hire Rules artificially depresses per diem rates for railcars used by the railroads. This creates a significant disincentive for railcar leasing companies, short lines and shippers to invest in new railcars, and is projected to result in a shortage of general-purpose railcars (particularly boxcars) in the near future. Given that more than 18% of the boxcar fleet is projected to fall out within five years (increasing to more than 40% in the following 5 – 10 years) unless substantial investments are made, it is our position that changes to the default rate rule must happen now to avoid the significant adverse impacts associated with a boxcar shortage.

As discussed during our meetings, in February of this year RSI petitioned the AAR's Equipment Assets Committee to revise the default rate rule mechanism set forth in the AAR Code of Car Hire Rules. RSI's proposal is to change the default rate rule so that it is based on an **average rate** paid for cars used during the prior quarter for the equipment type at issue (instead of the *lowest negotiated rate* as specified in the current default rate rule). However, the AAR's Equipment Assets Committee voted in May 2019 not to make any change to the current method for determining default car hire rates. RSI will continue to have discussions with the AAR and other interested stakeholders about changing the default rate rule, but it is possible that recourse to the Board may be necessary at some point to examine this issue.

In response to a question raised during our meeting with Chairman Begeman, RSI welcomes this opportunity to provide further information about its understanding of the Board's jurisdiction to review

and modify the default rate rule set forth in the AAR Code of Car Hire Rules. In 1992, the Interstate Commerce Commission (“ICC”) issued regulations that phased out the car hire prescription system that had been in place for railroad-marked railcars since 1977, authorized rail carriers to enter into bilateral agreements establishing market-based car hire rates for such railcars, and approved the arbitration provision of the AAR Code of Car Hire Rules to enable subscribing rail carriers to arbitrate car hire rate disputes.¹ As part of its 1992 rulemaking deprescribing car hire, the ICC adopted the AAR Code of Car Hire Rules as the governing car hire compensation system for those rail carriers which are subscribers to AAR Circular OT-10.² The default rate rule is included within the arbitration provision of the AAR Code of Car Hire Rules, which have been incorporated into AAR Circular OT-10.³

The regulations issued by the ICC in 1992 established a 10-year transition period for moving from prescribed rates to market-based rates.⁴ These regulations, still codified at 49 C.F.R. § 1033.1 and now administered by the STB, provide that the STB shall not prescribe car hire for market-rate cars. The regulations also provide that railroad subscribers to the AAR Code of Car Hire Rules can resolve car hire disputes pursuant to the arbitration rules set forth therein and that the Board may review allegations of abuse of the car hire dispute resolution procedures established under those rules. The Board also retained jurisdiction to resolve car hire disputes involving any rail carriers that are not subscribers to the AAR Code of Car Hire Rules.

The STB has exclusive jurisdiction under 49 U.S.C. § 10501 over transportation by rail carriers and the Board’s remedies with respect to car service rules (and various other aspects of transportation by rail carriers) are exclusive. In addition, under 49 U.S.C. § 11122, the Board’s regulations on car service “shall encourage the purchase, acquisition and efficient use of freight cars” and such regulations may include the compensation to be paid for the use of a freight car.⁵ In determining the rate of compensation, the Board must consider “the transportation use of each type of freight car, the national level of ownership of each type of freight car, and other factors that affect the adequacy of the national freight car supply.”⁶

The ICC had similar statutory authority before the creation of the Board, and it was pursuant to such authority that the ICC decided to move from prescribed rates to the market-based system set forth in the current regulations (which incorporates the AAR Code of Car Hire arbitration rules by reference). In

¹ Joint Petition for Rulemaking on Railroad Car Hire Compensation, 9 I.C.C.2d. 80, Ex Parte No. 334 (Sub-No. 8)(ICC decided Oct. 23, 1992)(“October 1992 Decision”).

² It is our understanding that almost all U.S. rail carriers are subscribers to AAR Circular OT-10.

³ The default rule also appears in Rule 1.H.1 of the AAR Code of Car Hire Rules as set forth in AAR Circular OT-10.

⁴ Those regulations excluded boxcars bearing Class III railroad marks from the market-based regime. Any such boxcars that were owned or leased by Class III carriers before December 30, 1983 have had their car hire rates frozen since 1986.

⁵ This statutory authority is a carryover from similar authority that was provided by Congress to the ICC, which enabled the ICC to both prescribe and then deprescribe car hire rates.

⁶ 49 U.S.C. § 11122(b).

establishing the market-based system, the ICC indicated it would retain general oversight over the system and that it was not abdicating its role in the car hire compensation process.⁷ Thus, as a general matter, it is RSI's understanding that interested parties have the authority to file a petition to reopen the rulemaking proceeding by which the current car hire compensation system was established (Ex. Parte 334 Sub. No. 8) in order to advocate for any desired change in the default rate rule.

In response to a question raised during our meeting with Board Member Oberman about the AAR's authority over the market rate system, we note that the arbitration provision of the AAR Code of Car Hire Rules was approved by the ICC under 49 U.S.C. § 10706 to allow the railroads (through the AAR as the Class I railroad industry association) to engage in joint ratemaking with antitrust immunity. As noted above, the ICC adopted the AAR Code of Car Hire Rules (including the default rate rule set forth in the arbitration provision) as the governing set of rules for determining market-based car hire (subject to the agency's general oversight over the market-based system going forward).

Thank you again for your willingness to discuss RSI's concerns about the default rate rule and its negative impact on railcar investment. We will be following up directly with each of your staff members to provide further information about this issue in the near future.

Sincerely,



E. Michael O'Malley
President

⁷ See, e.g., *Southern Pacific Transpo. Co. v. I.C.C.*, 69 F.3d 583 (D.C. Cir. 1995)(noting the "ICC's repeated assertions that it would keep a close eye on the depreservation program, and that it was ready and willing to respond to complaints about the operation of the program"); Joint Petition for Rulemaking on Railroad Car Hire Compensation, Ex Parte 334 (Sub-No. 8)(STB served April 22, 1997)(in deciding that Rule 25 (Car Hire Arbitration) of the AAR Code of Car Hire Rules could be amended without its prior approval, based on a request for clarification filed by The Greenbrier Companies, the STB stated that it "will rely on the complaint process and our own initiative to investigate any allegation or action in the car hire area to ensure consistency with the principles embodied in the ICC's approval of the Arbitration Rule and the rules governing car hire depreservation").