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Mr. Seth Harris
Obama-Biden Transition Team Leader
Transportation Review Team
Department of Transportation
1200 New Jersey Avenue SW, Suite 80302
Washington, DC 20590

Dear Mr. Harris and Transportation Transition Team Leaders and Members:

North America Freight Car Association (“NAFCA”) appreciates the opportunity to submit its views on certain significant rail transportation issues to the Obama-Biden Transportation Transition Team. Briefly and by way of background, NAFCA is an organization comprised of companies who manufacture, own, or operate freight cars that are not supplied by the railroads. In this regard, the nation’s major railroads currently supply fewer than 40% of all freight cars (down from 68% in 1980), with the balance supplied by private interests. NAFCA members own or operate approximately 656,000 non-railroad owned freight cars, or about half of all freight cars operating in the United States today. A list of NAFCA members who join in this letter is attached.

Rail transportation is undeniably an essential piece of America’s commercial fabric, without which many businesses could not operate. This is especially true where bulk goods are transported, such as those moving in tank cars or covered hopper cars, including chemicals, plastics, biofuels, grain, grain products, and animal feeds. The great distances between the areas where such products are produced and where they are con-



sumed make it uneconomical for trucks to be used and shippers of these products are highly dependent upon rail service.

Following partial deregulation of the railroad industry (the Surface Transportation Board (“STB”) still retains jurisdiction over many facets of rail rates and services, but its philosophy opposes strong regulation), railroads steadily withdrew from supplying rail-cars, leaving freight car supply to private sources, including railroad customers. Contemporaneously, railroads exercised their significant market power to implement various practices and programs designed to unfairly and disproportionately shift economic burdens to private car owners (i.e., non-railroad car owners) and shippers. Accordingly, NAFCA respectfully offers this letter to apprise the Transition Team of issues of importance, outlined below, which our membership believe should not be overlooked by the new administration. NAFCA thanks the Transition Team in advance for consideration of these issues.

1. **Shifting the Risks of Transportation from Railroads to Non-Railroad Car Owners.** Railroads historically have had a common carrier obligation to transport freight tendered to them on reasonable request and have been responsible for the condition of freight cars operating on their lines, which is eminently sensible since the railroads exclusively control their tracks and can police the condition of all cars operating over those tracks. Recently, however, railroads have pressed to divest themselves of responsibility for the cars they handle, in some cases taking steps to unilaterally impose unfair indemnification liability on private car owners, even where the railroads are negligent or fail to inspect the cars they move as required by Department of Transportation regulations.



For example, railroads are the only practical means to transport certain essential hazardous materials, but they have urged Congress to relieve them of their common carrier responsibility to handle those commodities or, alternatively, to create a regulatory regime whereby they restrict their own liability even in instances involving railroad negligence. Part of this proposed regime would impose the excess levels of liability on shippers, regardless of whether the shipper of the car in question was in any respect negligent. Similar efforts to impose liability on shippers of non-hazmat commodities are being pursued by railroads through unilateral tariffs that the STB does not routinely investigate. Railroads should not be permitted to dilute their common carrier responsibilities, particularly since they continue to enjoy the many benefits of common carriage, such as antitrust immunity, preemption of state law, and eminent domain.

2. Underrepresentation of Private Car Owners from the Railroad Industry Process of Establishing Rules for the Every-Day Use and Interchange of Freight Cars. Although the Department of Transportation sets standards for the construction and inspection of freight cars, every-day rules for the implementation of the interchange of those cars between railroads – whether the cars are owned by carriers or are privately operated – have been left by practice to the Association of American Railroads (“AAR”), the industry’s trade organization, although the STB has jurisdiction over freight car interchange and freight car practices. The AAR has structured itself so that all decisions regarding freight car qualifications and maintenance, many with expensive consequences to car owners, are controlled by the few large railroads, even though private car owners supply most of the cars. This structure has been used by the railroad industry to impose car maintenance costs on private car owners that have few safety consequences, but that pro-



vide economic benefits to the railroads. Railroads do not share these economic benefits with rail customers or private car owners who are the ones required to pay the majority costs of maintenance. Steps need to be taken to insure that those who supply a majority of the cars have a greater and more equitable voice in those decisions involving the conditions under which the cars will be used and how economic benefits from new technology will be shared. To date, efforts to resolve these issues through negotiation with AAR have been unsuccessful.

3. **Under-Pricing Private Cars.** Shortly after deregulation came about in the Staggers Act of 1980, the Interstate Commerce Commission (predecessor of the STB) changed the basis on which a railroad using a freight car will pay the car owner for use of the car. The law requires such use payments, but the ICC decided that compensation should be set by market forces, rather than designed to compensate the car owner for its investments. In practice, such payments are being established by railroad market power, not by a marketplace. Consequently, large railroads today seldom pay the real value of the cars they use, whether owned by shippers or car leasing companies. Non-railroad car ownership must more closely reflect its costs in order for an adequate supply of cars to be assumed to carry on the commerce of this Nation.

4. **Demurrage and Storage Charges.** Railroads set time limits by tariff for shippers to load and unload freight cars. Seeking to utilize their network to transport as much traffic over their high-density lines as possible, railroads have taken various steps to discourage the presence of private cars in the system. One such method has been to raise demurrage rates and reduce of amount of “free time” for loading or unloading the car. Until very recently, railroads provided trackage where empty cars could be held



prior to loading. Now when shippers lack the physical capacity to construct additional track on their property, these railroad tactics force shippers to reduce their use of private freight cars or face stiff financial penalties levied by the railroads. There is no STB standard by which to measure either the maximum acceptable level of a demurrage charge or the minimum amount of time that should be allowed for loading or unloading cars, and those matters need to be addressed to curtail railroad abuses, leaving what some see as an open field on which railroads can diminish private fleets.

5. **“Reforming” Federal Preemption.** Several federal laws, including the Federal Rail Safety Act (“FRSA”), govern critical aspects of the rail industry such as railcar design, manufacture, qualification, maintenance and repair. FRSA makes clear that laws related to railroad safety “shall be nationally uniform” to the extent practical. From a car owner’s perspective, it is essential that we be required to build, maintain and operate cars according to a limited number of safety standards. Otherwise, operational compliance would be virtually impossible. Car owners potentially would be subject to different/conflicting safety standards in every state and locality where cars operate. This poses a real threat of obsolescence to railcars in service today and serves as a disincentive for future investment.

In August, 2007, as part of the 9/11 Security Bill, certain changes were made to federal preemption as it pertains to rail transportation. This “reform” was intended to redress certain perceived inequities for state law claimants who allegedly were barred from seeking state court relief. Without debating the merits of the new law here, NAFCA respectfully submits that it has gone far enough, and any further modifications are unwarranted and would lead to unintended negative consequences.



Viewed as a composite, there is little doubt that the railroad industry seeks to operate with fewer freight cars even if it means pressuring private car interests to divest themselves of freight car investments made in good faith. When the nation's economy inevitably returns to a growth mode, these railroad policies will be contrary to the best interests of the nation's commerce.

In closing, we appreciate the Transition Team's consideration of the foregoing, and NAFCA would welcome the opportunity to meet with you to further discuss these critically important transportation issues.

Sincerely,

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President
North America Freight Car Association

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