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July 31, 2024

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Re: *State of Ohio and United States of America* v. *Norfolk Southern Railway Company, et al.,* D.J. Ref. No. 90–11–3–12792 - Comments of the North America Freight Car Association on Proposed Consent Decree

Dear Sir:

The North America Freight Car Association ("NAFCA")[1] hereby submits the following comments on the proposed Consent Decree lodged with the United States District Court for the Northern District of Ohio in the action *The State of Ohio and The United States of America v. Norfolk Southern Railway Company, et al.*, D.J. Ref. No. 90-11-3-12792 ("Consent Decree"). In Notices published in the Federal Register dated May 30, 2024 and June 14, 2024, the United States Department of Justice solicited comments on the Consent Decree, which is for the purpose of settling Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA") and Clean Water Act ("CWA") claims brought by the United States against Norfolk Southern Railway Company and Norfolk Southern Corporation (collectively, "NS") related to the February 3, 2023, train derailment in East Palestine, Ohio.

NAFCA is a trade organization made up of private (non-railroad owned) railcar manufacturers, owner/lessors, owner/lessees, lessees, and other rail shippers and entities that support the railcar industry. NAFCA's 40 members include some of the largest railcar manufacturers and lessors in the industry, as well as railcar shippers who collectively lease

[1] http://www.nafcahq.com/home.

or own hundreds of thousands of railcars that are furnished to the Class I railroads in order to receive rail transportation service. Combined, NAFCA's members own or lease 802,581 private rail cars out of the approximately 1,600,000 railcars currently in service, including tens of thousands of railroad tank cars. NAFCA promotes the safe, efficient, and economical ownership and use of private railcars. Its members' extensive and collective knowledge of the rail car industry enable it to investigate relevant issues and to educate public policy makers, regulators and the media regarding operational, regulatory, economic, and legal matters that affect private railcars. NAFCA strives to ensure its members and all private car owners and operators are subject to reasonable, equitable and lawful practices and rules affecting the use, repair, and principles of compensation for the use of private railcars by railroads.

NAFCA's comments on the Consent Decree are limited to voicing NAFCA's strong objections to proposed paragraphs 69 and 70, both of which should be deleted from the final version. Each of these provisions, if finalized as written, would be extremely disruptive to industry stakeholders beyond NS and are contrary to existing law, regulations and policies governing railroads and their customers. NAFCA's specific comments are as follows:

Paragraph 69

Under paragraph 69, within 180 days of the final Consent Decree being lodged, NS would agree to "cease use of any DOT-111 Tank Cars for transportation of Flammable Hazardous Materials, other than under a common carrier obligation." There are numerous problems with this provision. First, the vast majority of DOT-111 Tank Cars NS "uses" to transport Flammable Hazardous Materials are supplied to it by its customers as a condition for receiving rail service. If the intent of the Consent Decree is for NS to cease transporting DOT-111 Tank Cars for its customers – as opposed to NS ceasing to use only such cars that it owns for its purposes – then this provision would result in substantial harm to many third parties. These include the customers that supplied NS the DOT-111 Tank Cars, the customers' lessors if applicable, other Class I railroads with whom NS interchanges such cars as part of joint line rail movements, and the end users of the products being transported. None of these entities are parties to the litigation and the Consent Decree, but all would be significantly harmed by Paragraph 69's implementation.

Second, as noted in the comments submitted by the Railway Supply Institute ("RSI") and NAFCA member Union Tank Car Company ("Union Tank"), most railroad tank cars, including DOT-111 Tank Cars, are transported pursuant to rail transportation contracts as opposed to common carrier tariffs. Consequently, implementing Paragraph 69 would require the disruption of existing contractual relationships between NS and other parties.

Third, and perhaps most significant, Paragraph 69 is objectionable because it would unilaterally usurp the current established and detailed process for phasing out DOT-111

Tank Cars that was arrived at after years of extensive debate by Congress, the agencies with jurisdiction, and affected industry stakeholders. As explained in detail in the comments of RSI and Union Tank, which NAFCA supports, the phase out of DOT-111 Tank Cars is already covered in the Fixing America's Surface Transportation ("FAST") Act, Pub. L. No. 114-94, and by regulations promulgated by the Pipeline and Hazardous Materials Safety Administration ("PHMSA") after years of notice and comment rulemaking. Having participated in that multi-year process to establish the DOT-111 Tank Car phase out process and timeline, NAFCA and its members are committed to carrying out the transition on the promulgated timelines, if not sooner voluntarily if conditions warrant. Neither the Consent Decree nor Paragraph 69 provide any legal basis or justification for summarily amending the current PHMSA regulations, or the FAST Act itself for that matter, which would result in wide ranging impacts on the entire railroad industry, not just NS as the subject of the litigation.

Paragraph 70

Under Paragraph 70, "within 180 Days of the date of lodging, [NS] shall submit a 'Customer Tank Car Replacement Plan' to the United States for review and approval, taking into consideration [NS's] industry and technical expertise. [NS] will implement the Customer Tank Car Replacement Plan within 90 Days of approval. The Customer Tank Car Replacement Plan shall be designed to encourage customers to use DOT 117R Tank Cars (or similar armored Railcars) in place of DOT-111 Tank Cars for the transportation of Flammable Hazardous Materials and shall include financial incentives as an aspect of the plan. [NS] may seek designation of the Customer Tank Car Replacement Plan as Confidential Business Information under 40 C.F.R. Part 2 pursuant to the procedures set forth therein."

Viewed in its best light, Paragraph 70 appears to proceed from the naive assumption that a plan can be developed whereby DOT-111 Tank Cars are phased out using financial incentives that properly compensate NS's customers for enduring the cost and inconvenience of shifting to DOT 117R Tank Cars earlier than they are required to by the FAST Act and PHMSA regulations. As explained in the comments of RSI, Union Tank, and the American Chemistry Council ("ACC") however, this is simply not reality. Rather, the market power possessed by NS as one of only six Class I railroads would instead result in "financial incentives" in the form of increased line haul rates and surcharges that force customers to make a switch to their economic detriment. NS, ironically the defendant which should bear the costs of its actions that resulted in the lawsuit and Consent Decree, would stand to gain economically from such a plan.

NAFCA adds that Paragraph 70 is arguably contrary to applicable law and could force a result counter to the objectives of Paragraph 69. Specifically, if, as expected, NS attempted to implement a Customer Tank Car Replacement Plan that utilized higher linehaul rates and surcharges placed on the movement of DOT-111 Tank Cars pursuant to existing contracts, this could run afoul of the rules prohibiting unilateral changes to

material contract terms. Moreover, the legality of rates and charges a railroad may assess its customers for common carrier transportation is in the exclusive province of the Surface Transportation Board ("STB") pursuant to 49 U.S.C. §10501(b). All such rates and charges must be reasonable, as determined by the STB's rules and procedures. *See, e.g.,* 49 U.S.C. §10702 and §10704. Whether DOJ could legally approve a Customer Tank Car Replacement Plan with financial incentives in the form of higher rail rates and surcharges without STB oversight is therefore questionable. In any case, the inclusion of such features in a plan under Paragraph 70 could result in some NS customers refusing to renew, or to not enter into rail transportation contracts in order to preserve STB review. This would result in an increase in the number of common carrier DOT-111 Tank Car movements, which Paragraph 69 explicitly excludes from its terms.

For all the reasons stated in these comments, NAFCA requests that Paragraphs 69 and 70 be stricken from the final Consent Decree. NAFCA appreciates the opportunity to submit these comments on the proposed Consent Decree, and it supports the Comments submitted by RSI, Union Tank, and ACC.

Respectfully submitted,

Ben Sweat
NAFCA President