



Freight Rail
Customer Alliance



November 7, 2023

The Honorable Cynthia T. Brown
Chief, Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, S.W.
Washington, D.C. 20423-0001

Re: EP 711 (Sub-No. 2), *Reciprocal Switching for Inadequate Service*

Dear Ms. Brown:

The Freight Rail Customer Alliance (“FRCA”) and National Coal Transportation Association (“NCTA”) respectfully submit these comments in response to the Notice of Proposed Rulemaking (“NPRM”) that the Surface Transportation Board (“Board” or “STB”) served in the above-captioned proceeding on September 7, 2023.

The Freight Rail Customer Alliance (FRCA), 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.

The National Coal Transportation Association, www.movecoal.org, is a non-profit corporation comprised of electric utilities, coal producers, shippers of coal-related commodities, and entities that produce, repair, and manage all facets of railcar component parts and systems, as well as provide services for railcar operations. Its primary purpose is to promote the exchange of ideas, knowledge, and technology associated with the transportation and beneficial uses of coal.

FRCA and NCTA are generally very supportive of the NPRM and the proposal to retain, expand, and harmonize data reporting by railroads, require carriers to make individualized service data available to their shippers on request, and provide for the possibility of reciprocal switching to enable service by a competing line-haul carrier when the incumbent's service is inadequate as measured using objective standards that is unreliable relative to the Original Estimated Time of Arrival ("OETA"), inconsistent in terms of transit time, or inadequate in terms of first-mile/last-mile ("FMLM) service as measured by industry spots and pulls ("ISP"). The reporting of FMLM data and the availability of a FMLM/ISP industry spot and pull ratio is especially appreciated by NCTA and FRCA, which were two of the four signatories to the letter to the Board dated August 31, 2020, that called for improved transparency and data reporting regarding FMLM data. FRCA and NCTA greatly appreciate this aspect of the NPRM.

At the same time, FRCA and NCTA express their disappointment at the Board's decision to terminate EP 711 (Sub-No. 1), *Reciprocal Switching*, without explanation. In that regard, FRCA and NCTA concur in the sentiment expressed by Member Primus in his concurring statement. Reciprocal switching is needed not just for inadequate service, but as a potential remedy for the lack of competition within the railroad industry for those located near a junction of two carriers. That lack of competition is a core problem affecting both captive and so-called competitive shippers.

FRCA and NCTA also have a number of specific suggestions and concerns regarding the NPRM.

Definition of Terminal Area. There are areas where a single railroad provides the terminal services for itself as well as its competitor(s), and the requirement that two carriers perform terminal services in a given area appears overly restrictive. There should be an alternate measure based on distance, feasibility, and existing practices.

Standards Should Be Less Lenient. Furthermore, the thresholds are excessively generous to the railroads. Deliveries within 24 hours of the OETA only 60% over a 12-week period represents a very low standard. 70% should be adopted as soon as possible. A 20% increase in the average transit time over a 12-week period is also very lenient. For unit train shippers, which are unlikely to be protected under the OETA or ISP standards, 15% should be enough to trigger relief. Similarly, the ISP metric should require a success rate of 85%, and not merely 80%, over a 12-week period. Furthermore, the average transit time standard represents an average, whereas the OETA and ISP do

not, *i.e.*, a delivery that is one hour outside of the 24-hour window for OETA or the ISP service window is treated the same as a delivery that is three days late. Relief should be more readily available based on the severity of the service failure.

Leaky Criteria/Metrics. The specific criteria are well-intentioned, but may not hold up well in practice. For example, unreliable service can be gamed if the carrier quotes delayed OETAs, as the carrier controls its own standard of reliability. Similarly, inconsistent transit time can be gamed if service remains at the low end of allowed service for a sustained period. For example, if service is deficient by 19% three years in a row, the shipper may not qualify for relief, even though the cumulative transit time may have deteriorated by 68% over that period ($1.19^3=1.685$). Likewise, ISP performance matters little if the shipper is unable to obtain empty railcars. FRCA and NCTA appreciate that the NPRM seeks to include some protections for railcar unavailability, but railroads have shown considerable creativity in their efforts to limit railcars on their systems. Furthermore, slow cycle times can reduce the availability of railcars. The suggestion in the NRPM at 19 n.27 that trackage rights be available as an additional remedy is a constructive one. There will be situations where local service will continue to suffer even if the incumbent is relieved of linehaul responsibilities. Under those circumstances, reciprocal switching may offer little, whereas allowing a second carrier to provide the FMLM service may be extremely beneficial.

Limited Benefits for Unit Train Shippers. The benefits of the NPRM appear primarily directed to manifest traffic. As proposed, the unreliable/OETA remedy is limited to manifest traffic, and the FMLM/ISP does not appear to apply to unit train traffic. In that regard, it would be useful if reciprocal switching were available where the shipper desires increased deliveries and the incumbent linehaul/delivering carrier is unwilling to allow the shipper to use trainsets that it otherwise has available. Again, terminal trackage rights would be a useful adjunct remedy, as it would relieve the incumbent of the responsibility for providing local crews.

Concerns that Effectiveness of Relief Depends on an Alternate Carrier. One limitation of the reciprocal switching remedy is that it requires a second carrier that is ready, willing, and able to provide the replacement service and at an attractive rate. The availability is hardly assured. Furthermore, if the second carrier desires to provide the service, nothing prevents that carrier, at least where it serves the origin, from offering a “bottleneck” contract to the shipper that will effectively force the incumbent into providing reciprocal switching. The fact that such bottleneck rates are not generally available may undermine the effectiveness of reciprocal switching.

Application to Contracts. While FRCA and NCTA recognize that the existence of a rail transportation contract may potentially limit the availability of a remedy for deficient service, the NPRM proposal may have multiple beneficial impacts for contract shippers, if properly implemented. First, the carriers should still be required to report data to the Board and make individualized data available to contract shippers. Second, reciprocal switching remedies should be available immediately upon expiration of the contract, taking into account deficient contract performance. Third, the availability of a remedy for deficient common carrier service may, by agreement, become available in the case of contract service. In other words, the NPRM proposal may become a baseline against which parties negotiate contracts, thereby improving contract as well as common carrier service. It may become appropriate to consider whether new contracts that preclude the application of reciprocal switching relief for inadequate service are consistent with 49 U.S.C. § 11101(a) (“Commitments which deprive a carrier of its ability to respond to reasonable requests for common carrier service are not reasonable.”).

Application to Exempt Traffic. FRCA and NCTA agree with and support the NPRM’s treatment that exempt traffic would be eligible for reciprocal switching relief through a revocation of the exemption. NPRM at 27. Where service to exempt traffic is or becomes inadequate, market forces are demonstrably insufficient, and it becomes necessary to carry out the national transportation policy at 49 U.S.C. § 10101, the service problem is manifestly not limited in scope, and application of regulation is needed to protect shippers from the abuse of market power. 49 U.S.C. § 10502(a) & (d).

For the reasons stated, the NPRM proposal is not an ideal one, but it is more than a good start, which is why FRCA and NCTA support it. At the same time, there is ample opportunity for improvement, as noted in the comments above.

Respectfully submitted,



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