

BEFORE THE
SURFACE TRANSPORTATION BOARD

STB Ex Parte No. 767

FIRST-MILE / LAST-MILE SERVICE

COMMENTS OF THE ASSOCIATION OF AMERICAN RAILROADS

The Association of American Railroads ("AAR") respectfully submits these comments in response to the September 2, 2021 decision of the Surface Transportation Board ("Board") that requested comments from stakeholders on issues related to first-mile / last-mile ("FMLM") service ("September Decision" or "RFI").¹ The September Decision requested comments on several topics, including the identification of FMLM issues, the design of metrics to measure FMLM service, the current data tracked by carriers, and the costs and benefits of any suggestions. Within each topic area the Board set forth multiple questions for which it seeks information.

Much of the information requested in the RFI is specific to railroads or their customers and their individualized experiences. AAR's freight member railroads will file comments speaking to their individual practices. AAR's comments provide general information about FMLM service and raise some overarching concerns arising out of the Board's broad request for information. Part I provides information regarding numerous variables that can impact FMLM

¹ Pursuant to a decision on September 21, 2021, the procedural schedule was extended, requiring comments by December 17, 2021, and replies by February 17, 2022.

service. Part II notes that stakeholders would benefit from a better understanding of the intended purposes for any information collected by the Board. Part III notes that any information collection must account for the benefits and costs it would impose on stakeholders and the Board itself. Part IV notes that the Board must also account appropriately for competitive concerns that could arise from the collection of broad swaths of service-related information. Finally, Part V provides information regarding the types of information collected by Railinc and its limited usefulness in measuring FMLM service.

I. Many Factors Outside a Railroad’s Immediate Control Influence FMLM Rail Service.

Railroads operate as one part of an interconnected, continent-spanning network. This network leads from real origin to final destination (not just railroad origins and destinations) and likely involves more than just one railroad and more than one mode of transportation. Indeed, the first and last rail miles are often the middle miles of freight’s journey.² Now more than ever, railroads and society at large are appreciating that to function smoothly, every link in the supply chain must work in a precisely coordinated sequence. Numerous actors and variables in those movements can impact the FMLM service of the participating railroads. A disruption in one region can impact the FMLM rail service of another region. Disruptions anywhere caused by other supply chain participants could negatively affect the FMLM service provided by a Class I railroad. The Board must be able to account for these factors in any data collection or reporting regime and should consider the extent to which it can obtain information regarding other modal participants.

² See Comments of the Association of American Railroads, *America’s Supply Chains and the Transportation Industrial Base*, DOT Docket No. DOT-OST-2021-0106 (Oct. 18, 2021).

Additionally, FMLM service, like all rail service, is also impacted by the fact that railroads operate an outdoor plant. Unforeseen circumstances, like wildfires, flooding, washouts, hurricanes, accidents, or severe weather events, can arise on the railroad creating delays and unsafe operating conditions. By their very nature, such events are unpredictable and can wreak havoc on the railroad and its ability to provide service. Similarly, with trackage and facilities being outdoors, maintenance is integral to safety. The amount of maintenance or the need for maintenance depends upon factors like the usage of the line and the weather impacts of the line. Certainly, more maintenance and/or inspections are required when the line carries more volume or is in specific geographic regions or climates. These variables should also be recognized in any proposed data collection intending a fair assessment of FMLM service.

Finally, FMLM service is heavily dependent on coordination with shippers and receivers. Indeed, what makes FMLM different than line-haul transportation is the need for railroads to coordinate with a wide range of entities to tender or receive rail cars. Any metric or reporting of FMLM service issues must account for shipper's or receiver's actions that can frustrate FMLM service. For example, if a shipper notifies the railroad the cars are ready to be picked up, but the cars have not actually been set out, the railroad may come on its scheduled day to find facility gates locked and cars unavailable to be pulled. This could mean the shipper does not get service again for another day or two. A receiver may also not be prepared to take a shipment given its inability to clear space in its facility, thereby leaving the railroad to deliver at a different day or time.

Rail terminals are focused on throughput and the smooth functioning of terminals depends on receivers maintaining a consistent flow of freight out of rail facilities to make room

for other freight moving in. Rail terminals are simply not designed for, and are not physically capable of, long-term storage of cars or commodities, and it is imperative that shippers be ready to receive their cars and receivers be prepared to accept their deliveries. If they are not, the impacts can reverberate throughout the supply chain, ultimately affecting service in other regions or areas. To obtain a full understanding of FMLM service issues, the Board must measure shipper or receiver actions that impact FMLM service and tailor its reporting to incorporate that information as well.

II. The Board Should Clearly Articulate a Need for Any Additional Reporting Requirements.

A. The September Decision does not identify a regulatory problem.

The principles of good government require that regulators clearly articulate the need for action. The first step in articulating a need for action is to identify the problem. The Board defines FMLM service as “the movement of railcars between a local railroad serving yard and a shipper or receiver facility.”³ It further explains that:

So-called “local trains” serve customers in the vicinity of the local yard, spotting (i.e., placing for loading or unloading) inbound cars and pulling (i.e., picking up) outbound cars from each customer facility. A larger local yard may run numerous local trains serving many customers dispersed along separate branches; a smaller yard may run only a handful of local trains. Yard crews build outbound local trains by assembling blocks (groups of cars) for each customer on the route. Inbound local trains return to the yard with cars released from shipper facilities and, in turn, are sorted into outbound blocks for line-haul movements.⁴

While the Board explains what it believes FMLM service to be, it does not explain what aspects of FMLM it is concerned about (e.g., spotting inbound cars, pulling outbound cars, yard-crew

³ RFI at 1.

⁴ *Id.*

building, etc.). Instead, the September Decision cites to vague service concerns raised in letters from shippers' associations as justification for its information requests.⁵ No specific problem, however, was articulated by the Board. In fact the Board admits that it does not know of a particular problem with FMLM service, but instead it requests comment as to "what, *if any*, FMLM issues" exist and "what, *if any*, actions may help address such issues."⁶ The Board's request for "concrete examples, *if possible*" confirms the impression that the Board is hunting for evidence of a problem.⁷ Before embarking on a path to impose new reporting requirements on the railroads, the Board should articulate the specific problem it is trying to solve, if any. That would permit stakeholders to identify and provide relevant and useful information in response to the Board's request. AAR appreciates that the Board is "exploring" this matter, but the lack of clarity on what the agency seeks to achieve limits our ability to meaningfully comment.⁸

B. There has been no showing that the Board needs to collect data on FMLM service.

Railroads already provide tools for their customers and communicate service issues on an individualized basis. Rail customers can receive information regarding their individual FMLM service. Shipper *associations* may collect and present anonymized complaints of when something went wrong for a particular shipper, but that does not mean the customer is not

⁵ *Id.* at 2-3 (citing ACC's desire for "a more complete and useful picture of rail service, including [FMLM] performance"; ACC's "general service concerns"; TFI's "general service concerns"; and the Shipper Group's "improved transparency.").

⁶ *Id.* at 4 (emphasis added).

⁷ *Id.* (emphasis added).

⁸ *Id.* at 2.

receiving timely information from the rail carrier. Indeed, some customers do not even consistently utilize the tools available to them. In other instances, customers negotiate for different data or data formats than that offered by the carriers. Given there is already individualized service data available to shippers, mere assertions that there are unspecified “problems” with FMLM service, without more, is no justification for a broad-based rule on data collection. It is far from clear that the market has failed to provide shippers with information they need.

The Board states that “some of the issues ... raised” include “missed switches ... modified service plans ... car delivery ... extended dwell ... and discrepancies in information.”⁹ If such problems happen, and are properly within the Board’s jurisdiction, they should be addressed in individual proceedings, with specific relief prayed for. Each circumstance is fact-specific and such inquiries require case-by-case adjudication. The Board should explain how collecting FMLM service data would address individual shipper concerns better than existing remedies.¹⁰

Aggregated, public, FMLM data would not be useful. Each railroad movement has different characteristics and requirements. Whether one carrier fulfilled its common carrier obligation to one customer or not is irrelevant to whether that carrier or any other carrier is fulfilling its obligation to any other customer. If shipper A’s switch is missed for delivery of its chemicals in the South, it is not clear why reporting that information to the Board would be

⁹ *Id.* at 5.

¹⁰ See 44 U.S.C. § 3508 (“the collection of information by the agency is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility.”).

relevant to shipper B who is on a separate railroad in the Midwest, moving grain. There is simply no showing of a connection between the collection of data about one shipper—much less what that data is—to another shipper’s service level. While the Shipper Group claims monitoring service data would help to understand if “carriers are meeting their common carrier obligations in the aggregate”, there is no aggregate common carrier obligation.¹¹

C. The customer specific nature of FMLM service lends itself to investigating specific service issues as needed.

The Board has successfully addressed nationwide or regional service issues as they have arisen in the past through situation-specific, limited, and temporary reporting. For example, in 2018, after becoming “increasingly concerned about the overall state of rail service” including letters from two major rail shipper trade associations, the Board requested specific information with regard to locomotive availability, employee resources, local service performance, demand expectations, communications, and capacity constraints.¹² The seven Class I railroads responded to these letters within weeks, providing the requested information and addressing the Board’s concerns. Similarly, in May 2020, as the nation began its recovery from COVID-19, Chairman Begeman preemptively wrote each Class I railroad requesting information regarding their preparedness to meet future demand, including availability of train crew, yard, and maintenance employees.¹³ Again, all railroads responded, addressing the matters of concern to the Chairman, without requiring formal action by the Board. As the year progressed, the Board,

¹¹ RFI at 4.

¹² See Letter from Ann Begeman and Deb Miller, STB, to Carl Ice, President and CEO, BNSF, at 1 (March 16, 2018) (similar letters sent to each Class I railroad).

¹³ See Letter from Ann Begeman, Chairman, STB, to Keith Creel, President and CEO, Canadian Pacific, at 1 (May 7, 2020) (similar letters sent to each Class I railroad).

jointly with FRA, noted some “service issues, including missed industrial switches and excessively late or annulled trains due to crew availability issues” and explained the need for increased transparency and communication with rail shippers to plan to meet their needs.¹⁴ Again, railroads responded, even though they were not specifically asked for any information. By simply noting specific concerns and/or requesting specific information regarding particular service-related matters, the Board has successfully addressed service concerns based on the unique facts of each situation and did so in a situation-specific manner without locking in permanent reporting requirements that might be irrelevant or unhelpful in other situations.

In some instances, such as after the harsh polar vortex in the winter of 2013-14, the Board has required temporary data reporting from all Class I railroads to provide “the agency and stakeholders access to data needed for real-time understanding of regional and national service issues.”¹⁵ The temporary data reporting, however, was only implemented after the Board held two hearings on service issues. The Board then instituted a rulemaking to require long-term reporting of service information, after taking comment, opening the record for ex parte communications, and allowing responses to written summaries of ex parte meetings.¹⁶ While the reporting requirements were modified over time, the Board built a record of what data would best suit the situation.

¹⁴ See Letter from Ronald Batory, Administrator, FRA, and Ann Begeman, Chairman, STB to Jean-Jacques Ruest, President and CEO, Canadian National Railway Company, at 1 (Aug., 24, 2020) (similar letters sent to each Class I railroad).

¹⁵ See *U.S. Rail Serv. Issues—Data Collection*, EP 724 (Sub-No. 3), at 2 (STB served Oct. 8, 2014).

¹⁶ See *U.S. Rail Serv. Issues—Data Collection*, EP 724 (Sub-No. 4) (STB served Dec. 30, 2014); *U.S. Rail Serv. Issues—Data Collection*, EP 724 (Sub-No. 4) (STB served Nov. 9, 2015); *U.S. Rail Serv. Issues—Data Collection*, EP 724 (Sub-No. 4) (STB served Nov. 16, 2015).

FMLM service, in particular, is unique to a customer, with differing circumstances for each movement. As such there may be little relevance in nationwide reporting of individual service issues. Depending on the nature of the FMLM service issues identified in the responses here and should the Board determine that some form of reporting is needed, the Board should follow a similar process to require temporary reporting that identifies helpful information, before determining whether a permanent rule is necessary.

III. The Agency Should Ensure Costs and Benefits of Any Information Collection are Properly Considered.

The Board is well-aware of AAR's outstanding request for incorporation of a formalized cost-benefit analysis into the Board's rulemaking process that was filed nearly three years ago.¹⁷ The Supreme Court has held that, even in the absence of a specific statutory requirement to prepare a cost benefit analysis, an agency's failure to consider whether a regulation "does significantly more harm than good" is inconsistent with its obligation to adopt "appropriate and necessary" regulations.¹⁸ AAR appreciates the recognition that there may be "trade-offs" related to any suggestions, as that indicates a desire to move forward in a fashion that considers the costs and benefits of any action the Board proposes to take.¹⁹

It bears noting that there could be a significant burden placed upon railroads to report vast service-related information not collected in the ordinary course of business. By its nature, FMLM data would touch each and every origin and destination on the rail network, of which

¹⁷ *Association of American Railroads' Petition for Rulemaking*, EP 752 (filed Mar. 14, 2019).

¹⁸ *Michigan v. EPA*, 135 S. Ct. 2699, 2707 (2015).

¹⁹ RFI at 6.

there are tens of thousands, and every carload, of which there are tens of millions.²⁰ This would amount to an extensive undertaking. Commenters that suggest data to be reported should include the entity required to report the information and a proposal for how that information would be collected and reported. This specificity will assist the Board, and stakeholders, to better understand the costs and benefits of proposals being made. In the past, the Board has recognized that “information filing can be burdensome ... and that it can divert resources away from the transportation issues Reporting requirements impose real world costs on railroads and service reporting diverts railroad operating personnel from their principal mission of running the railroad.”²¹ Reporting of FMLM service information in particular would require substantial involvement of operational personnel. Distracting such individuals from their principal mission of running the railroad could actually exacerbate the issues the Board is attempting to address here.

The Board should also be cognizant of the time and resources *it* would need to dedicate to collecting, storing, sorting, reporting, and protecting information it ultimately requests. For example, the broadest set of data regarding FMLM service could amount to tens of thousands of data points. As every rail movement has a first mile and a last mile, each shipment would include two sets of information. The Board should be concerned about requiring a massive data dump of dubious utility that will require substantial resources to evaluate and comb through.

²⁰ See Association of American Railroads, *Railroad Facts 2020*, 26 (2020 ed.).

²¹ *Joint Petition for a Further Service Order*, SO 1518 (Sub-No. 1), et al., slip op. at 4 (STB served July 31, 1998).

A vast collection of data on railroad movements could also present unintended risks, including the risk of disclosure of security-sensitive information or confidential information. As the Board recognized in its waybill sample collection proceeding, it should “fully assess the utility of the collection and weigh that against any identified implementation or data management issues.”²²

The burdens of any information collection undertaking should only be imposed if the benefits created exceed those costs.²³ Given the lack of an identified problem the FMLM data will help solve, it is obviously not yet possible to determine what the benefits would be to the railroads, shippers, Board, and general public. However, it is certainly the case that detailed reporting of all service at every origin and destination, even if possible, would produce little to no benefit for the Board, shippers, or railroads, much less the general public.

IV. When Collecting Service Data the Board Should Properly Account for Competitive Concerns.

The agency should “do what it can to apprise itself—and hence the public and the Congress—of the economic consequences” of a proposal before it decides how to act on that proposal.²⁴ Here, those consequences could be significant, depending on how the Board proceeds. The Board should ensure that whatever action it takes accounts for competitive and economic harms that could arise from reporting of data and making that data public.

²² *Waybill Sample Reporting*, EP 385 (Sub-No. 8), slip op. at 6 (STB served Sept. 3, 2020).

²³ *See Michigan v. EPA*, 135 S. Ct. 2699, 2707 (2015).

²⁴ *Chamber of Commerce of the U.S. v. SEC*, 412 F.3d 133, 144, (D.C. Cir. 2005); *see Bus. Roundtable v. SEC*, 647 F.3d 1144, 1148 (D.C. Cir. 2011).

As the Board knows, the provision of service information and the type of service information provided by railroads to shippers is an area in which railroads can, and do, compete. Railroads are constantly re-evaluating their service options to meet their customers' needs. The type of service information provided to customers is one such area and is one where freight railroads are developing new technologies to compete with one another and other modes. There is a wide range of practices at Class I railroads that will be detailed in individual carrier submissions, but as the Board determines whether and what information it is to collect, the Board should do so in manner that does not stifle innovation in this space.

The Board should also ensure no proprietary or competitively sensitive information is released to the public. If the Board were to collect and make public some of the railroad specific data called for in its RFI, like "concrete examples" of FMLM service issues, it could inadvertently provide insights into the markets and operations of individual railroads. As the Board has recognized in the waybill context, "release of [] information could cause a rail carrier harm by providing competitors with insights into its markets and operational methodologies. Additionally, anticompetitive effects could result."²⁵ Without the appropriate protections in place, allowing such a result would be an inappropriate use of the Board's data collection authority.

Similarly, it is also important to recognize the impacts of releasing service information on shippers and receivers. Specific information about one shipper's service could create benefits to their competitors. If one shipper is known to be suffering from service issues, then

²⁵ *Release of Waybill*, 1987 ICC LEXIS 377, *9, 4 I.C.C. 2d 194 (1987).

its competitor could market themselves as more reliable and thereby take the shipper's business. Moreover, specific shipment information, number of cars ordered, routes, and other information can be commercially sensitive if made public. As with railroad data, the Board has taken great precaution in the past regarding sensitive shipper data, noting "data such as identification of the commodity, railroad, origin and destination of the traffic and confidential contract rate may be commercially sensitive to shippers or manufacturers."²⁶ The Board should continue to recognize that revealing specific service issues about rail customers may provide an advantage in the market to that customer's competitors.

Given these concerns, in deciding what, if anything, it will collect on FMLM service, the Board should protect commercially sensitive data from the harms of release to shippers and railroads alike. First and foremost, the courts have recognized that the Board's statutory authority to collect data does not require that information to be released publicly.²⁷ So, to the extent such information is collected, the Board should protect it from release. The RFI recognizes this sensitivity, noting that "a protective order may be issued that would allow sensitive information to be filed under seal," if necessary to respond to the RFI.²⁸ However, whatever information is ultimately collected should be similarly protected, and not made public.

To the extent potentially sensitive information is determined necessary for collection, the Board may consider aggregating information at an industry or customer level. Aggregation

²⁶ *Id.*

²⁷ *See AAR v. US*, 371 F Supp. 114 (DDC 1974).

²⁸ RFI at 4.

tends to ameliorate competitive harms because it does not identify a specific shipper or railroad. For example, under the Board's regulations for waybill releases, information may not be used by practitioners, consultants or law firms "unless the evidence is aggregated to the level of at least three shippers and will prevent the identification of an individual railroad. Non-aggregated evidence submitted to the Board will be made part of the public record only if the Board finds that it does not reveal competitively sensitive data."²⁹ However, the trade-off for the Board's consideration is the limitation on the utility of the information if it is aggregated. If the Board allows for the collection or the release of FMLM service data, it should do so only if the appropriate protections are in place for sensitive information in a manner that does not identify the shipper or railroad involved in any specific movement.

V. The TRAIN II Dataset Collected by Railinc is Limited in its Usefulness and Scope for Measuring FMLM Service.

The Board expressed interest in "the insights it may be able to draw from event data such as the TeleRail Automated Information Network (TRAIN II) information exchange protocol or similar datasets available to the railroads."³⁰ Railinc's role in the industry is, in part, to facilitate the interchange of equipment among the railroads. One tool that assists in achieving that goal is the TRAIN II system, which was designed to better understand car location and utilization, thus enabling efficient management of the car fleet.³¹ However, the event data

²⁹ 49 C.F.R. §1244.9(b)(4)(iv).

³⁰ RFI at 4, fn 15.

³¹ Railinc, TRAIN II User Manual, at 1-1 (Feb. 2021) (available at: <https://public.railinc.com/sites/default/files/documents/TrainII.pdf>).

collected by Railinc through the TRAIN II system is not intended to measure levels of service, much less FMLM service, and would be unreliable for that purpose.

The TRAIN II system operates primarily through information from railroads about events related to railcars. The event information is transmitted to Railinc using messages from a number of sources, including from automated readers along the railroads' rights-of-way. While these events assist Railinc in determining the location of the car, mileage traveled, and other car information, they are not designed to provide service-level reporting.³² Some messages are more detailed than others in the type and amount of information provided; some are direct measures and some are estimates.³³ Importantly, not all events on the network are reported to Railinc; Railinc estimates millions of events each month are *not* reported to it.

Those missed events are not evenly distributed across traffic. For instance, not every shipper has installed an event reader at its facility to report car placement or release, and so many such events are based on crew reports or automated messages. Wider installation of automated readers has not been undertaken in part because customers already know when equipment arrives or departs their facilities.

In addition, there is no standard with regard to placement of readers, nor is there a pre-determined mileage for placement of readers throughout the network. Nor is the reporting and distance of event messages standardized. Railroads vary in the frequency of reports

³² See *Id.* at 2-4.

³³ See *Id.*

submitted to Railinc and the level of detail provided in the messages.³⁴ While the TRAIN II system and other event data is useful for the purposes for which it was developed, it is simply not designed to report useful FMLM service data. Standardization and universal reporting would be significant undertakings that would require development of reader placement requirements, event message standards, and message information requirements, among other needs. It is questionable whether such an undertaking would be worth the costs, which would not properly be borne by the railroads in any event.

Conclusion

AAR respectfully suggests that as the Board proceeds further in this matter, it should articulate a need for any information collected, ensure all variables impacting FMLM service are accounted for in the collection, evaluate the costs and benefits of its actions, and implement appropriate protections for the information to be collected.

Respectfully submitted,



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³⁴ See, e.g., Railinc, TRAIN II User Manual, at 2-4 (Feb. 2021) (“**Use of the TRAIN10 syntax is encouraged.** The TRAIN10 is the most comprehensive of the event reporting messages and includes new features not available in TRAIN01/31 messages.”) (emphasis in original).