

BEFORE THE
SURFACE TRANSPORTATION BOARD

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Docket No. EP 711 (Sub-No. 1)

RECIPROCAL SWITCHING

REPLY IN OPPOSITION TO
MOTION OF THE ASSOCIATION OF AMERICAN RAILROADS TO EXTEND THE
PROCEDURAL SCHEDULE

submitted by

THE COALITION ASSOCIATIONS

The Coalition Associations¹ hereby reply in opposition to the “Motion of the Association of American Railroads to Extend the Procedural Schedule” (“Motion”) filed by the Association of American Railroads (“AAR”) on January 10, 2022. The Motion requests a 75-day continuance of the procedural schedule served by the Surface Transportation Board (“STB” or “Board”) on December 28, 2021 (“Hearing Notice”). That decision scheduled a public hearing for March 15 and 16, 2022, and called for written testimony to be submitted by February 14, 2022. In the alternative, AAR requests that (a) the deadline for submitting written testimony be extended until March 7, 2022, a week prior to the hearing; and (b) the Board accept additional

¹ The “Coalition Associations” are the American Chemistry Council (“ACC”), The Chlorine Institute (“TCI”), the Corn Refiners Association (“CRA”), The Fertilizer Institute (“TFI”), and The National Industrial Transportation (“NITL”). Except for CRA, each Association previously submitted comments in this proceeding as members of the Shipper Coalition for Railroad Competition (“Shipper Coalition”).

written comments for a reasonable period following the hearing. The Coalition Associations oppose the Motion in all respects, except for the request to accept written testimony after the hearing, provided that such testimony is limited to responding to the hearing testimony, both written and verbal. In all other respects, AAR has failed to provide sufficient justification to support the Motion.

I. AAR's Motion Indicates a Need for the Board to Clarify That the Scope of the Hearing Is Limited.

The Board already has a full and complete record upon which to issue a final decision in this rulemaking proceeding. Indeed, the voluminous written record dating back to 2011, and developed over 6 years, closed and was ready for a decision when reply comments were filed on January 13, 2017. Ex parte meetings between industry stakeholders and Board members have since occurred periodically up until December 2021. Nevertheless, the Coalition Associations understand that the Board feels a need to grant parties the opportunity to “update” the record after the passage of five years, to ensure that there have been no significant changes or additions to material facts. The Board, however, should not allow an “update” to be converted into a complete “reopening” of the record for new evidence and argument on matters that could and should have been presented earlier in this proceeding. The Motion suggests that is precisely what AAR intends, which is why it has requested more time.

The purpose of the hearing is “[t]o allow interested persons to submit testimony to update the record....” Hearing Notice, at 2. The Board has identified the following two areas for updating:

- “First, comments may identify new developments (i.e., developments that have occurred since the Board previously invited comments in this proceeding) that a commenter finds are relevant to a final decision in this matter and address any change or significant development in a commenter’s views since the previous round of comments.”

- “Second, comments may address topics that were discussed in ex parte communications that have taken place since October 25, 2016, in this proceeding.”²

These topics establish that the scope of the hearing is restricted to “new developments” or “changes” of view, and topics raised in ex parte communications.

The AAR appears to interpret this scope very broadly as an invitation to present new analyses even on matters that could and should have been addressed earlier in this proceeding. But AAR’s very general statements in the Motion make it difficult to determine whether the analyses that it needs more time to prepare are within the limited scope of the hearing.³ If they are beyond the scope of this hearing as defined in the Hearing Notice, there is no justification for granting the Motion. Moreover, as addressed in Part II below, even if the analyses are within the scope of the Hearing Notice, the AAR has not presented sufficient information for the Board to ascertain if the additional time requested is necessary or reasonable.

If the Board intended this hearing to be as broad as AAR contemplates, it could have reopened the record to receive a supplemental round of opening and reply comments. It did not. Therefore, in view of AAR’s expansive interpretation of the Hearing Notice, the Board should use its decision on the Motion to clarify that the hearing scope is limited to updates concerning developments and events since the written record closed in January 2017.

² Hearing Notice, at 6 (underline added). Although the Motion, at 3, identifies three topics, the first bullet in the Motion is illustrative of the second, which in turn corresponds with the first bullet in the above text. To the extent that AAR is suggesting a broader scope based upon its first bullet, that is inaccurate.

³ AAR has identified a single analysis in sufficient detail to suggest that it is beyond the scope of the Hearing Notice. The Coalition Associations address that analysis, which pertains to rail consolidation, in Part II.B. below.

II. The Board Should Deny AAR's Request for Additional Time.

AAR provides three arguments in support of the Motion. They either are insufficiently supported by the facts or otherwise are inadequate to justify AAR's request.

A. AAR's alleged need for more time to prepare for the hearing is unsupported and overblown.

First, AAR asserts that, because "this proceeding has remained largely dormant since early 2017[,],...the parties, their counsel, and experts need time to re-familiarize themselves with the record and prepare materials that supplement, rather than restate, previous submissions that date back to 2011." Motion at 4. But the AAR fails to persuasively explain why the seven (7) weeks provided by the Board to prepare written comments describing industry developments since January 2017, plus an additional five (5) weeks to prepare oral testimony, are insufficient. To be clear, The Coalition Associations do not need more time to re-familiarize themselves with the record and prepare their testimony and, to their knowledge, no other shipper interests intend to express that need.

AAR also postulates that some "experts who have previously participated in this proceeding have retired or may otherwise be unavailable," and thus parties will have to engage new experts who will need to become acquainted with the record. But the AAR has not identified any of its experts as being unavailable; nor has it indicated what analyses performed by those experts require updating consistent with the scope of the Board's request for written comments and why the current procedural schedule is inadequate for that purpose.

In addition, although the Hearing Notice was served on December 28, 2021, the hearing dates have been known since the STB made a public announcement on November 12, 2021. In its announcement, the STB declared that:

Since issuance of the NPRM and receipt of written comments in this docket, there have been significant changes in and affecting

the freight rail industry. Commenters may now have additional or modified views on the effects of and/or need for the proposed regulations. Interested persons are invited and encouraged to engage in this public hearing to address these issues and any other matters relevant to this proceeding.

Thus, all stakeholders had effective notice of the hearing date four months in advance and three months before the due date for written testimony. The Motion acknowledges the earlier public announcement but disingenuously pleads ignorance that the STB would request further written comments and testimony before the hearing, even though pre-hearing written testimony has been routine in the most recent STB hearings.⁴ Motion, at 4 (footnote). Indeed, the Coalition Associations have been preparing for the hearing since November based upon that assumption.

AAR's expression of a need to refamiliarize itself with the record also is disingenuous because AAR has actively engaged in ex parte meetings with several Board members since last September. Surely AAR did not go into those meetings unprepared to discuss the record. Indeed, AAR even prepared a hand-out, labeled a "Comment Key," that provided a bullet point list of the key points in its prior comments with page references. Moreover, unlike AAR's counsel, who must be familiar with the total record, AAR's experts only need familiarize themselves with the portions of the record relevant to their testimony and then, only if their testimony is of the type that might merit updating. As addressed in the next section, only one of AAR's experts performed any such analyses.

In summary, AAR's concerns are unsupported and overblown.

⁴ See e.g., *Hearing on Revenue Adequacy*, Docket No. EP 761, slip op. (served Sept. 12, 2019); *Oversight Hearing on Demurrage and Accessorial Charges*, Docket No. EP 754, slip op. (served April 8, 2019).

B. AAR has not identified relevant and material analyses that require updating and cannot be updated within the current procedural schedule.

Second, AAR asserts that “the evidentiary record in this proceeding is particularly stale, and the necessary updates...from the past five years are likely to be substantial and demand more than a few weeks’ time to adequately capture in testimony and comments.” Motion, at 5. As discussed in Part I above, the Coalition Associations disagree with AAR’s interpretation of the scope of the Hearing Notice, which appears to be the basis for this assertion. Nor do they agree that the record is stale. The AAR’s assertion, which constitutes its core justification for granting the Motion, has multiple dimensions, none of which have merit.

The AAR has not identified a specific analysis that requires updating to reflect current conditions, much less attempted to explain why it cannot update that analysis within the current procedural schedule or how updating such analysis will better inform the Board’s final decision. Absent such information, the Board is unable to conclude there is a need for more time.

The Coalition Associations, nevertheless, have reviewed AAR’s prior comments in EP 711 (Sub No. 1) and the testimony of its three witnesses – Michael R. Baranowski, Mark Fagan, and William J. Rennie – to ascertain which analyses, if any, AAR may intend to update within the scope of the Hearing Notice.⁵ The analyses of Mr. Fagan and Mr. Rennie can be readily dismissed. Mr. Fagan’s analysis was entirely theoretical and thus requires no updating.⁶ Mr. Rennie used historical analysis, hypothetical illustrations, and deductive reasoning, to

⁵ If one considers 2013 testimony in the predecessor to the current docket, EP 711, Mr. Baranowski and Mr. Rennie submitted testimony there too, along with testimony submitted jointly by B. Kelly Eakin and Mark E. Meitzen.

⁶ Similarly, the 2013 testimony of Messrs. Eakin and Meitzen was entirely theoretical, and they expressly state, “that there is generally a lack of information to perform quantitative analyses to fully address the questions raised by the Board” and “it is questionable whether this information could be readily developed...” Docket No. EP 711, “Joint Verified Statement of B. Kelly Eakin and Mark E. Meitzen,” pp. 1, 9 (attached to AAR Opening Comments filed March 1, 2013).

conclude that adding more switches to a movement reduces efficiency and increases the risk of service failures.⁷ Apart from analyzing historical trends related to interchange events per rail car pre- and post-Staggers, Mr. Rennieke did not perform any data analysis. There is no reason to believe those historical trends would be any different today. Nor has any stakeholder contested Mr. Rennieke's historical data analysis; rather, they have contested the conclusions that he derived from it because he wrongly assumes that most, if not all, reciprocal switching will increase the number of switches performed on a rail car instead of merely changing the location where switching occurs.⁸

That leaves only Mr. Baranowski's testimony as a candidate for updating. Presumably, this is the analysis to which the AAR refers when it describes "analyses drawn from the Board's confidential Waybill Sample data." Motion, at 5. That statement could reference two different analyses performed by Mr. Baranowski in 2013 and 2016, although the Motion is cryptic on that point.

Mr. Baranowski's 2016 analysis consisted of a 5-page verified statement in which he analyzed 2014 waybill data to estimate the number of non-exempt carloads that potentially could be affected by Prongs 1 and 2 of the proposed rules at bands of 10, 15, and 30 miles. For the public interest Prong 1, he identified high percentages of potentially affected carloads, ranging from 75.7% to 83.7%.⁹ For the competitive access Prong 2, he identified much lower

⁷ Docket No. EP 711 (Sub No. 1), "Opening Comments of William J. Rennieke," pp. 4-8 (historical analysis), 8-12 (hypothetical illustrations of adding switch events), 12-14 (increased uncertainty and service problems) (attached to AAR Opening Comments filed Oct. 26, 2016). This was mostly an expansion upon Mr. Rennieke's 2013 testimony.

⁸ *E.g.*, Docket No. EP 711 (Sub No. 1), "Reply Comments submitted by The Shipper Coalition for Railroad Competition," pp. 60-61 (filed Jan. 13, 2017) ("Shipper Coalition Reply").

⁹ Docket No. EP 711 (Sub No. 1), "Verified Statement of Michael R. Baranowski," pp. 4-5 (attached to AAR Opening Comments filed Oct. 26, 2016).

percentages ranging from 6.6% to 16.4%.¹⁰ Of course, these are only carloads that might be sufficiently close to an existing interchange, at the assumed distances, to request reciprocal switching under one of the prongs. There is no assessment, nor could there be, as to whether any of those carloads could qualify for reciprocal switching under any of the substantive requirements in the proposed rules. Moreover, Mr. Baranowski's methodology is riddled with flaws and errors that generate absurd and meaningless results.¹¹ But even accepting those results at face value, AAR has not identified any new developments or changes in the past five years that are likely to generate significantly different results.¹² Updating this analysis merely for the sake of using more current data is meaningless if there is no hypothesis as to why those results may be meaningfully different. Furthermore, those results project an unrealistic worst-case scenario at such high numbers that any update based upon the 2019 waybill sample could not possibly alter the fundamental conclusions that AAR has drawn from the 2014 data.¹³ Thus, extending the procedural schedule would be an unnecessary and wasteful delay.

If AAR is seeking more time to update Mr. Baranowski's analysis of 2014 waybill data, at a minimum, it should explain why it cannot do so within the current procedural schedule and what changes since 2014 have the potential to significantly alter the results and conclusions

¹⁰ *Id.*

¹¹ Shipper Coalition Reply, Docket No. EP 711 (Sub No. 1), pp. 89-95.

¹² The Hearing Notice, at 6, refers generically to "significant operational changes in and affecting the freight rail industry." But AAR still must identify specific changes and explain how those changes may have affected the waybill data in a manner that alters the results of its previous analyses.

¹³ Based upon the record, the weight given to Mr. Baranowski's analysis by the STB after considering the alleged flaws in his methodology will be a far more relevant consideration than determining whether updating that analysis with 2019 waybill data increases or decreases the percentage of potentially affected carloads relative to the 2014 waybill data.

derived from the 2019 data. AAR has done neither. Thus, the Board should deny the Motion as insufficiently supported.

If AAR also intends to update Mr. Baranowski's 2013 analysis of 2010 waybill sample data, that analysis is far too attenuated from the Board's proposal to be of any relevance to this proceeding. In 2013, the Board asked stakeholders to evaluate the potential impact of the proposal in the NITL Petition for Rulemaking that was the origin for EP 711.¹⁴ Unlike the current Board proposal, the NITL proposal had clearly defined objective criteria to determine eligible traffic that made it far easier to estimate such impacts. Even then, the AAR did not attempt to calculate the financial impacts of the NITL proposal, as requested by the Board, concluding that "it is not possible to predict the level of rail rates or the precise amount of lost revenues...."¹⁵ Instead, as it did in 2016, AAR attempted to estimate the number of potentially affected carloads. Thus, Mr. Baranowski's 2016 analysis is properly viewed as an update of his 2013 analysis but modified to reflect the Board's proposal rather than the NITL proposal. Consequently, Mr. Baranowski's 2013 analysis cannot be viewed as separate from his 2016 analysis for update in this hearing.

In addition to Mr. Baranowski's two prior analyses based upon the waybill sample, the Motion seemingly suggests that AAR cannot fully develop its hearing testimony until the Board releases the 2020 waybill sample data. Motion, at 5. Specifically, AAR notes that "the Board has yet to announce the release of 2020 Waybill Sample data" and "[t]hus, although the Board

¹⁴ Docket No. EP 711, *Petition for Rulemaking to Adopt Revised Competitive Switching Rules*, slip op. at 2 (served July 25, 2012).

¹⁵ Docket No. EP 711, "Opening Comments of the Association of American Railroads," p. 15 (filed March 1, 2013). *See also*, Docket No EP 711, "Reply Verified Statement of William J. Rennie," p. 17 (attached to AAR Reply Comments filed May 30, 2013) ("It is impossible to predict accurately the revenue losses that would occur under the NITL's proposal, however, because there are too many unknowns.").

has expressed particular interest in understanding parties' views on the proposed rule in light of the 'significant operational changes in and affecting the freight rail industry' in the time '[s]ince the issuance of the NPRM' (Notice at 6), the key data is already two years old and does not reflect significant and important developments in the industry, including any observable impacts from global supply chain challenges during the pandemic." *Id.*

There are at least three problems with AAR's statement. First, there will always be a time lag in producing the waybill sample data and thus it will never be possible to analyze data that reflect the most current period. Second, supply chain issues resulting from the pandemic are temporal in nature and rulemaking decisions that are intended to apply generally should not be predicated on such transient conditions. Indeed, by the time the Board issues a final decision adopting new reciprocal switching rules and decides the first case, the pandemic supply chain impacts may have subsided or no longer exist and, even if they remain, the Board could delay the effective date of the rules. Thus, pandemic related supply chain impacts should not be relevant to a final decision in this matter. Third, the AAR seems intent upon conducting new analyses of pre-existing issues, in contrast to updating its prior analyses or analyzing new developments. But apart from evaluating pandemic effects, AAR has not identified any new development since 2017 that may be relevant to a final decision in this matter that AAR requires the waybill sample to analyze.

The point of this public hearing is to update the record based upon relevant changes that have occurred since 2017, not to perform all new analyses that could have been performed previously but were not. If AAR needs more time to perform relevant analyses within the scope of the Hearing Notice, it must provide more specific justification.

Finally, AAR contends that, because consolidation within the rail industry has been discussed in several recent ex parte meetings, “it would be natural to address the issue through an analysis of STB Waybill Sample data going back to 1992—data that have not previously been authorized for use in this proceeding.” Motion, at 6. This is a classic overreach by AAR. First, AAR has not explained how it would use waybill sample data to address the ex parte meeting discussion of the role of consolidation in this proceeding. The specific point raised in those meetings by members of the Coalition Associations was that reciprocal switching is needed because railroads have extended their bottlenecks through mergers.¹⁶ It is not at all clear how analysis of waybill sample data back to 1992 will generate relevant information in response to that point and AAR has not offered any such explanation. Second, to the extent AAR seeks to analyze rail consolidation from any other perspective (despite such perspective not being an ex parte meeting topic), AAR has had at least since 2013 to perform such analyses, because that is when consolidation in the rail industry was first presented as a justification for this proceeding and it has continued to feature prominently in the most recent round of comments.¹⁷ The purpose of this hearing is not to present evidence and argument that could and should have been presented in prior submissions but were not.

Thus, rail industry consolidation is not a “new” development or “changed” view legitimately within the scope of the Hearing Notice. Rather, AAR relies upon the fact that it was a topic in ex parte meetings. Just because an issue was discussed in ex parte meetings should not

¹⁶ This ex parte meeting topic was an illustration of the bottleneck extension scenarios described in the Shipper Coalition Reply Comments, pp. 55-56 (filed Jan. 13, 2017).

¹⁷ E.g., Docket No. EP 711, “Reply Submission of The National Industrial Transportation League,” pp. 5, 9-10 (filed May 30, 2013); Docket No. EP 711 (Sub No. 1), “Comments submitted by The Shipper Coalition for Railroad Competition,” pp. 10-11 (filed Oct. 26, 2016); Shipper Coalition Reply, pp. 23-24, 55-60 (filed Jan. 13, 2017).

make it fair game for new evidence when neither the issue itself nor the evidence presented in the ex parte meeting is new. In ex parte meetings, the parties have conducted summary reviews of their prior comments, especially to educate the newest Board members who are new to this docket.¹⁸ If that fact by itself is enough to bring a subject within the scope of the Hearing Notice, then the Board may as well not have any limits at all. The Board should use its decision on the Motion to provide clarity on this point so that all parties are preparing testimony from the same baseline.

C. Activity in other Board proceedings does not justify delaying EP 711.

Third, AAR justifies its Motion because “significant activity is underway in many other important, industry-wide proceedings before the Board that requires engagement in the coming weeks by many parties and counsel associated with this proceeding.” Motion, at 6. But as discussed above, AAR has known about this hearing and the other deadlines since early November, and the shipper interests who also are engaged in both this docket and those other proceedings oppose this Motion. Furthermore, the Board recently alleviated some of this overlap by extending the dates for reply comments by 30 days in Docket Nos. EP 755 and 765, which

¹⁸ See *e.g.*, Docket No. EP 711 (Sub No. 1), “Summary of Sept. 17, 2021 Ex Parte Meeting Between AAR and Member Michelle Schultz” (served Sept. 29, 2021) (“AAR highlighted key points in the written record” and attaching a “Comment Key”); Docket No. EP 711 (Sub No. 1), “Summary of Aug. 10, 2021 Ex Parte Meeting Between Shipper Associations and Member Michelle Schultz” (served Aug. 13, 2021) (“the meeting’s purpose was...to help educate Member Schultz on the Shipper Associations’ position” and attaching a “Key Messages” summary). Both AAR and the Coalition Association members conveyed the same messages and attachments in their ex parte meetings with other Board members.

previously had coincided with the hearing date in this docket.¹⁹ Granting this Motion will reduce the separation created by that decision to just 15 days.²⁰

III. The Board Should Deny AAR's Alternative Request, with One Limited Exception.

The Board should deny AAR's alternative request to extend the due date for submitting written testimony by three weeks until March 7, 2022. That date, which is just one week prior to the hearing dates, will not afford Board staff sufficient time to digest and summarize comments so that the Board Members can be prepared for the hearing. Nor will it afford stakeholders sufficient time to do the same. The AAR surely knows that and is gambling that the Board then might also extend the hearing dates by an additional three weeks. As discussed in Part II above, any extension is unwarranted. Moreover, a three-week extension will bring the hearing dates back into conflict with the due date for reply comments in Docket Nos. EP 755 and 765, by reducing the separation to just nine days.²¹ Even those nine days of separation will disappear, however, if the Board also grants AAR's additional alternative request for post-hearing comments.

¹⁹ See the consolidated decision in Docket No. EP 755, *Final Offer Rate Review*, and EP 765, *Joint Petition for Rulemaking to Establish a Voluntary Arbitration Program for Small Rate Disputes*, slip. op. (served Dec. 29, 2021). In that same decision, the STB denied a motion filed by the same shipper interests represented by the Coalition Associations to hold EP 765 in abeyance, which could have avoided the commitment of resources to that proceeding entirely, but railroad interests uniformly opposed that motion. EP 711, which has been pending for far longer than either EP 755 or EP 765, should have priority on the STB's docket.

²⁰ Currently, the due date for written testimony in this docket is February 14th and the due date for EP 755 and 765 reply comments is April 15th. If the STB grants this Motion for a 75-day extension, written testimony will be due April 30th, which is just 15 days after the reply comments.

²¹ A three-week extension of the hearing dates would be April 5-6, and the EP 755 and 765 reply comments are due on April 15.

The Coalition Associations do support AAR's alternative request for post-hearing comments, provided that those comments are limited to addressing issues presented in either pre-hearing written testimony or the hearing itself. Indeed, the Board has sought similarly limited post-hearing comments in recent hearings, although it typically has announced its intent to do so at the conclusion of those hearings rather than in the hearing notices.²²

IV. **Conclusion.**

For all the foregoing reasons, the Coalition Associations oppose the AAR Motion to extend the procedural schedule. However, they support the portion of AAR's alternative request for post-hearing comments, provided that those comments are limited to addressing issues presented in either pre-hearing written testimony or the hearing itself.

Respectfully submitted,

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²² See Docket No. EP 761, *Hearing on Revenue Adequacy*, slip op. (served Dec. 17, 2019); Docket No. EP 754, *Oversight Hearing on Demurrage and Accessorial Charges*, slip op. (served May 24, 2019).