

BEFORE THE
SURFACE TRANSPORTATION BOARD

303941

STB Ex Parte No. 767

FIRST-MILE / LAST-MILE SERVICE

COMMENTS OF THE ASSOCIATION OF AMERICAN RAILROADS

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Pursuant to the Request for Information (“RFI”) issued on September 2, 2021, and the decision establishing a schedule for comments served on September 21, 2021, by the Surface Transportation Board (“STB” or “Board”) in this proceeding, the Association of American Railroads (“AAR”) respectfully submits these reply comments.

AAR submitted comments responsive to the RFI on December 17, 2021. AAR’s comments provided general information about first-mile/last-mile (“FMLM”) service and raised some overarching concerns arising out of the Board’s broad request for information. The comments noted that stakeholders would benefit from a better understanding of the intended purposes for any information collected by the Board. The comments also provided information regarding numerous variables that can impact FMLM service and noted that any information collection must account for the benefits and costs it would impose on stakeholders and the Board itself. The comments also cautioned that the Board must also account appropriately for competitive concerns that could arise from the collection of broad swaths of service-related information. Finally, AAR explained the types of information collected by Railinc and its limited usefulness in measuring FMLM service.

The comments filed in this proceeding confirm that railroads already provide their customers a wide range of data about the transportation of their shipments and that shippers can monitor their own service levels. The comments filed by organizations that advocate for regulatory interventions on behalf of rail customers revealed their desire for the Board to collect information that could serve to drive new litigation pathways. As explained below, the service concerns raised by those shipper organizations are better considered in the context of individual cases.

ARGUMENT

I. The Opening Comments Demonstrate that Railroads Provide, and Shippers Maintain, FMLM Service Data on Individual Movements

Railroad comments submitted in this proceeding show that carriers already provide significant amounts of data to their customers. For example, BNSF related the details of its internal monitoring system to both track its performance at local serving yards and shipper facilities and how it shares relevant data with its customers through an online portal.¹ Norfolk Southern explained how it has recently completed an extensive redesign of its shipment management tool to maximize its utility and functionality for customers.² CSX's comments set forth how its technology allows customers visibility into first-mile/last-mile service.³ KCS, like other carriers, provided trip plan compliance data to customers and is currently reworking how

¹ BNSF Ry. Co. Comments, *First-Mile/Last-Mile Service*, EP 767, at 3-9 (Dec. 17, 2021) ("BNSF Comments").

² Norfolk Southern Ry. Co. Comments, *First-Mile/Last-Mile Service*, EP 767, at 1-9 (Dec. 17, 2021) ("NS Comments").

³ CSX Transp., Inc. Comments, *First-Mile/Last-Mile Service*, EP 767, at 2-7 (Dec. 17, 2021) ("CSX Comments").

to best provide other data to customers.⁴ For its part, CN's comments outlined the multiple tools that they provide their customers.⁵ In addition, the American Short Line and Regional Railroad Association's comments detail how short line railroads provide information to the customers they serve.⁶ Shipper organization comments confirm that their members receive data from the railroads regarding their service.⁷

Shipper organization comments also confirmed that shippers collect their own data on service issues. For example, "[s]hippers typically maintain data regarding railcar and train events to prove negative impacts on service. Often, the shipper's data does not coincide with the rail carrier's data or the carrier's data does not track specific metrics which directly impact shippers."⁸ Similarly, WCTL notes that "[s]hippers typically are aware of their own service experience and can typically access information about their individual movements through the carrier's customer interface."⁹ Given railroads provide, and shippers retain, information on

⁴ Kansas City Southern Ry. Co. Comments, *First-Mile/Last-Mile Service*, EP 767, at 3 (Dec. 17, 2021) (KCS Comments).

⁵ Canadian National Ry. Co. Comments, *First-Mile/Last-Mile Service*, EP 767, at 3-12 (Dec. 17, 2021) ("CN Comments").

⁶ American Short Line and Regional Railroad Association Comments, *First-Mile/Last-Mile Service*, EP 767, at 5-8 (Dec. 16, 2021) ("ASLRRA Comments").

⁷ Western Coal Traffic League, et al., Comments, *First-Mile/Last-Mile Service*, EP 767, at 20-21 (Dec. 17, 2021) ("WCTL Comments") ("Some carriers do publicly provide trip plan compliance data."); American Petroleum Institute Comments, *First-Mile/Last-Mile Service*, EP 767, at 8 (Dec. 17, 2021) ("API Comments").

⁸ API Comments at 3; see National Grain and Feed Association Comments, *First-Mile/Last-Mile Service*, EP 767, at 3 (Dec. 17, 2021) ("NGFA Comments") ("...customers to try to collect their own FMLM data"); American Chemistry Council, et al., Comments, *First-Mile/Last-Mile Service*, EP 767, at 12 (Dec. 17, 2021) ("ACC Comments") ("...members can create some FMLM performance data from their own observations").

⁹ WCTL Comments at 24.

their specific movements, it is not clear from the record what the public need is for the Board to require further reporting of these individual movements.

II. The Record Does Not Establish a Problem to be Solved by Regulation

The Board did not identify a specific problem in the RFI that would be resolved by regulation. It only asked commenters to provide FMLM service problems “if any.”¹⁰ As railroads pointed out, issues occurring at first mile and last mile level tend to be customer specific.¹¹ Indeed, several shipper interests admit the same.¹²

There are a number of issues that can impact service, including weather, the actions of others in the supply chain, and other matters outside the railroads’ control.¹³ Shipper comments recognized the complexities of operating an outdoor plant, noting “[g]eography, topography, and numerous other system and local factors are going to mean that an hour delay at one location on one carrier may not be fully comparable to an hour delay at another location on the same or another carrier.”¹⁴ Shipper interests also understand that individual shippers can be responsible for FMLM service delays, “NITL acknowledges that missed switches can occur due to rail customers’ mistakes, such as not releasing cars timely or not managing a blue

¹⁰ See Request for Information, *First-Mile/Last-Mile Service*, EP 767, at 4 (Sept. 2, 2021); see also Association of American Railroads Comments, *First-Mile/Last-Mile Service*, EP 767, at 4-5 (Dec. 17, 2021) (“AAR Comments”).

¹¹ See CSX Comments at 8; BNSF Comments at 12-13.

¹² See WCTL Comments at 29.

¹³ See AAR Comments at 2-4.

¹⁴ WCTL Comments at 29; see also Diversified CPC International, Inc. Comments, *First-Mile/Last-Mile Service*, EP 767, at 5 (Dec. 17, 2021) (“CPC Comments”) (“...considering the expansive geography of the Class I’s, and the extensive number of locations, yards, and customers.”).

flag appropriately.”¹⁵ Because there are so many reasons for the variability in rail service, it is not clear what exact problem is trying to be solved in this proceeding or how further reporting would solve that problem.

III. No Party Has a Justifiable Need for the Agency to Collect Specific Data

While shipper interests offer a variety of ideas on types of data to collect, they provide scant explanation how additional collection of data would benefit them. Overall, shipper interests generally state more data reporting would help with individual shippers’ own planning or own service generally; however, they do not explain how aggregated data reported to the Board would help in any specific instance.¹⁶ Indeed, some recognize the limits of aggregated data.¹⁷ To the extent shipper interests just want the data reported to them by administrative fiat, that is nothing more than a desire to have a regulatory thumb on the scale of commercial dealings.¹⁸ Indeed, one shipper group admits that FMLM data requirements will allow them to “engage railroads in *commercial* discussions about FMLM service.”¹⁹ This implies that shipper interests believe the Board should use its regulatory authority to provide them free information to leverage in their commercial dealings. That would be entirely inappropriate use of the Board’s regulatory authority.

¹⁵ National Industrial Transp. League Comments, *First-Mile/Last-Mile Service*, EP 767, at 4 (Dec. 17, 2021) (“NITL Comments”).

¹⁶ See NGFA Comments at 3; Glass Packaging Institute, *First-Mile/Last-Mile Service*, EP 767, at 2 (Dec. 17, 2021) (“GPI Comments”); WCTL Comments at 24-25; ACC Comments at 14.

¹⁷ See API Comments at 7; WCTL Comments at 24.

¹⁸ See ACC Comments at 10, 14, 20, 22, 27, 28, and 33.

¹⁹ *Id.* at 7 (emphasis added); see Institute of Scrap Recycling Industries, Inc. Comments, *First-Mile/Last-Mile Service*, EP 767, at 5 (Dec. 17, 2021) (“ISRI Comments”); API Comments at 7-8; ACC Comments at 14.

Furthermore, collection of data and requirements to report do not fall on shippers, but instead create burdens that are primarily on the railroads. Shipper interests acknowledged this fact, as well.²⁰ Even the Department of Transportation (“DOT”) recognizes the burden on railroads, “DOT understands that any additional reporting that railroads are asked to provide could create burdens for railroads.”²¹ Several shipper interests suggest multiple reporting requirements and metrics on a weekly or otherwise regular basis. Not only does the actual effort of collecting, sorting, and compiling information on all metrics or requirements on all movements take tremendous resources, but it would require development of systems and software to do so – not to mention standardization of it across all railroads. While DOT and others speak in generalities about wanting more information, no one identifies a legitimate need.²² A mere desire to have more information does not justify the burden on railroads to collect, sort, analyze, and provide detailed metrics and information on every single movement a railroad undertakes.

IV. FMLM Service Data Would Not be Useful in Establishing a Minimum Service Standard

It is clear that some organizations that advocate at the STB on behalf of rail customers view this proceeding as a way to advance new litigation avenues at the Board. Indeed, some shipper groups explicitly indicate that their goal is for the Board to require more data be

²⁰ CPC Comments at 7 (“Tracking FMLM service performance requires more detail, presenting a greater challenge.”); ACC Comments at 19 (“identifying meaningful FMLM reporting that does not place an undue burden on railroads is a complex endeavor”).

²¹ Department of Transportation Comments, *First-Mile/Last-Mile Service*, EP 767, at 4 (Dec. 17, 2021) (“DOT Comments”).

²² See, e.g., *id.* at 4 (explaining that “DOT’s view is that this additional information could be crucial to addressing supply chain concern”, however DOT does not explain how more information will address supply chain concerns); WCTL Comments at 17-18; ACC Comments at 14; NGFA Comments at 3.

reported to create new right of action and to facilitate litigation.²³ Such calls misunderstand the regulatory paradigm around rail service.

When the Board was created in 1996, it was not charged with directly overseeing the tens of thousands of individual rail movements that are transported across the nation each year. As such, Congress did not empower the agency to create generalized service standards. Even in an era of greater regulatory command and control, the ICC explained with regard to setting service standards that “establishing such standards would be inconsistent with our current policy of encouraging (especially in the absence of market dominance) service competition regulated by the marketplace.”²⁴ Instead, the statutory paradigm recognizes that market forces will discipline rail service in most instances. As such, the common carrier obligation, is appropriately considered on a fact-specific, case-by-case basis.²⁵ To achieve this, the statute expects complainants to bring specific claims that rail carriers have failed to meet statutory standards and bear the burden of proof. This is because the common carrier obligation is determined based on the totality of the circumstances, not just one aspect of a move. When it comes to specific service concerns, this makes sense, as the individualized nature of rail service lends itself to a case-by-case evaluation process. Given the vast difference

²³ NITL Comments at 4-6; ISRI Comments at 7; GPI Comments at 2.

²⁴ *Reasonable Dispatch (Perishables)*, 364 I.C.C. 168, 169 (1980).

²⁵ See *Granite State Concrete Co. v. STB*, 417 F.3d 85, 92 (1st Cir. 2005) (“The STB has been given broad discretion to conduct case-by-case fact-specific inquiries to give meaning to these terms, which are not self-defining, in the wide variety of factual circumstances encountered”); *Nat’l Grain & Feed Ass’n v. United States*, 5 F.3d 306, 310 (8th Cir. 1993) (“Congress did not further elucidate the requisites of the common carrier obligations, leaving to the Commission and the courts the task of clarifying, on a case-by-case basis, a more precise definition of ‘reasonable request,’ ‘adequate car service,’ and ‘reasonable rules and practices.’”).

in factors that impact service issues, it would be inappropriate to create any service presumptions regarding the common carrier obligation, much less compare one railroad's service to another in a different location. Shippers now seek to use data collection as a first step towards circumventing that process.

Customers seeking enhanced levels of service can enter into rail transportation contracts pursuant to 49 U.S.C. § 10709, and can enforce those contracts privately.²⁶ For other customers, railroads remain subject to the common carrier obligation to provide service with reasonable dispatch.²⁷ Efforts to enable customers to compare their service at the carload level with the service of other customers in different locations with different schedules, facilities, and business arrangements will not do anything more than create frustration, confusion, and endless litigation. Additionally, these efforts will require the Board to collect, process, and protect enormous amounts of data, the commercially sensitive nature of which, even gives some shippers pause.²⁸ There is no reason to believe such a system will result in improved service for any customer, instead it may create perverse incentives for railroads not to offer premium service to those customers who wish to purchase it.

²⁶ See WCTL Comments at 18 (“For contracts, court litigation and arbitration are sometimes an option as well”).

²⁷ See 49 U.S.C. § 11101; *United Transp. Sys. v. PIE Import Export*, 889 F. Supp. 94 (1995).

²⁸ See NITL Comments at 5; ACC Comments at 16-17.

V. Shipper Comments Provide Generalized Anecdotal Service Concerns That Are Appropriately Considered in Specific Cases

Only one individual shipper filed comments in this matter.²⁹ Instead, in the majority of comments shipper associations relayed anecdotal, anonymous complaints or generalized service concerns as justification for regulatory intervention.³⁰ These allegedly aggrieved shippers, however, can file cases and attempt to demonstrate unreasonable service with particularized evidence. Indeed, some groups admit as much, “[u]nreasonable practice complaint or injunctive relief are possible options.”³¹ Instead of filing such case, however, shippers merely want to entice regulatory intervention without incurring the time and effort to appropriately address their concerns before the Board.

Moreover, shippers can and do utilize the Board’s informal processes to resolve disputes. As noted by several shippers, the Board’s RCPA can mediate informal disputes without resorting to formal complaint processes.³² Railroad carriers always strive to work constructively with RCPA and individual shippers to resolve concerns prior to issues being elevated.

In addition, shippers can also work with their carriers directly to improve reliability. This is noted by some, “a shipper may be able to contact a carrier representative directly.”³³ Others

²⁹ See CPC Comments.

³⁰ See National Association of Chemical Distributors Comments, *First-Mile/Last-Mile Service*, EP 767, at 2-6 (Dec. 17, 2021) (“NACD Comments”); API Comments at 2-6; International Liquid Terminals Association Comments, *First-Mile/Last-Mile Service*, EP 767, at 2-4 (Dec. 17, 2021) (“ILTA Comments”); ACC Comments at 7-10.

³¹ WCTL Comments at 18.

³² See NACD Comments at 3; NGFA Comments at 3; NITL Comments at 5.

³³ API Comments at 3.

explain that “[a]t times, the freight rail customer can request special or ‘weekend’ switches to make up for a lost switch.”³⁴ Further, the only individual shipper to file comments explained how its carrier does work with them, noting that “[t]he railroad sales and marketing managers that we work with on service issues have been understanding ... [a]fter we showed [the railroad] the negative impact the new schedule would have on our production, they responded by restoring the original switching schedule. This is just one example of our experience addressing service issues with railroad personnel who are on line with the customers.”³⁵ In addition to in-person service, rail carriers have even investing significantly in technology to address shippers’ needs, which some shipper associations recognize, “[i]n most interactions with carrier’s service case log system, it is a private messaging-type service. For some carriers, the case is assigned to a specific analyst.”³⁶ Simply put, railroads communicate with their customers.³⁷

There are a variety of other ways that the Board and its staff gain visibility into rail service issues, including FMLM service. For example, as KCS notes, OPAGAC meets with Class Is on a regular basis.³⁸ During the pandemic, the Board was able to hear directly from railroads regarding service matters through scheduled joint calls with the Federal Railroad Administration. In addition, when specific matters arise, the Board does not hesitate to request

³⁴ NITL Comments at 4.

³⁵ CPC Comments at 6.

³⁶ API Comments at 3.

³⁷ CN Comments at 2.

³⁸ See KCS Comments at 5.

information through publicly available correspondence with Class Is.³⁹ These efforts ensure the right information can be elicited depending upon the unique nature of the issues being experienced. But, there is no evidence of individual service concerns being resolved through generalized ongoing data collection.

CONCLUSION

The record compiled thus far in this proceeding confirms that rail customers have access to a large amount of data regarding their service, including service over the first and last mile. AAR respectfully suggests that before the Board pursues any regulatory requirements, it should articulate a need for any information collected, narrowly tailor any collection to those needs, 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 collection and stored by the Board.

Respectfully submitted,



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³⁹ See Surface Transportation Board, *Non-Docketed Public Correspondence*, available at: <https://www.stb.gov/news-communications/non-docketed-public-correspondence/>.