

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

ENTERED
Office of Proceedings
November 7, 2023
Part of
Public Record

Docket No. EP 711 (Sub-No. 2)

RECIPROCAL SWITCHING FOR INADEQUATE SERVICE

ESSENTIAL MINERALS ASSOCIATION COMMENTS

Essential Minerals Association (EMA) submits these comments in response to the Surface Transportation Board's (STB or the Board) Notice of Proposed Rulemaking (NPRM) in "Reciprocal Switching for Inadequate Service," which focuses on providing rail customers with access to reciprocal switching as a remedy for poor service, based around three measures of carrier success or failure, namely: (1) service reliability; (2) service consistency; and, (3) adequacy of local service.

EMA is a trade association that represents companies that mine, process, and sell industrial minerals throughout North America. EMA represents a diverse set of member companies across the nation engaged in mining and processing of ball clay, barite, bentonite, borates, calcium carbonate, diatomite, feldspar, industrial sand, kaolin, lithium, mica, perlite, potash, quartz, salt, soda ash, sodium bicarbonate, talc, and wollastonite, and other minerals. The industrial minerals produced by EMA member companies are the raw material feedstock that is incorporated into a broad range of products, including among other things, containers, foods, flat and specialty glasses, paint and coatings, ceramics, and a broad range of building products. Additionally, industrial minerals are used to make foundry molds and cores used to manufacture cars, SUVs, and trucks, railcars and almost all other items that have metal castings. EMA's member companies are experiencing tremendous difficulty in meeting the worldwide demand for their products as a result

of poor rail service, the unreliability of which also raises the ultimate customer costs and hamstrings these North American companies competing in that global market. Rail carriers' unreliable service is unnecessarily so, and railroads' conscious choice to ignore customer needs is hurting EMA members and the U.S. economy as a whole; service will only deteriorate if carriers are not held accountable.

EMA members continue to be adversely impacted by poor rail service. Industrial minerals are low margin, high volume products. Member companies are heavily dependent on a reliable and cost-effective rail transportation network and are major shippers with the major rails. Under the current process for the reciprocal switching remedy, EMA members do not bring forward these types of cases and are often forced to modify operations to their detriment because no other viable options are present. This results in negative impacts throughout the supply chain, ultimately hurting not only EMA members, but also their customers.

EMA appreciates that the STB has an important role in overseeing freight rail policies on rail shippers and is encouraged the STB is seeking ways to improve the reciprocal switching remedy in line with the intent of Congress. EMA urges the Board to breathe new life into this remedy that has been underutilized for decades and to provide a method to counter the Class I railroads' lack of focus on the service needs of their customers. Given the ongoing and universal experience of poor railroad service, EMA is fully supportive of Board action to hold railroads accountable in this regard and to enforce, in the Board's own words, "unambiguous, uniform standards...consistently applied across Class I rail carriers and their affiliated companies." These proposed rules, if implemented with EMA's suggested modifications detailed below, will go some way to ensuring that American industrial mineral companies are able to compete at the global stage rather than die at the hands of rail carrier inaction. Although railroads should be held accountable

in any case, EMA notes that reliable service is of particular importance for an industry structured around low margins and high volumes of products. EMA members work tirelessly to mine, process, and sell the industrial minerals on which so many other industries depend, and it is time the railroads are better incentivized even to approach that same standard.

COMMENTS ON THE PROPOSED RULE

Reflecting the Board's primary focus, EMA's commentary related to the proposed rule chiefly relates to the three proposed measurement standards for carrier service to be standardized across all Class I carriers. However, at the outset, EMA notes that in order for the implementation of any version of these standards to truly affect and improve the nation's rail service, the resulting reciprocal switching agreements need to endure for significantly longer than the proposed minimum two-year and maximum four-year periods.

Indeed, EMA appreciates the Board singling out this very issue in soliciting comment regarding whether a longer period is necessary, as it very much is needed. EMA asks that the Board implement a five-year period as the absolute minimum duration of the reciprocal switching agreement. A period of some significance is necessary for competing carriers even to consider expending the capital necessary to implement a switch. If the potential new carrier can expect just two-years' benefit at bottom, the shortness of the arrangement is likely to dissuade any action at all. Moreover, the knock-on effect will be that incumbent carriers are less intimidated, leaving the proposed rule toothless. The proposed rule is strong only so long as it truly incentivizes incumbent carriers to provide better service, and that incentive itself depends on competitor carriers' sufficient economic motivation to pose a threat to the incumbents.

Secondly, EMA appreciates the Board’s proposed requirement that carriers provide data to the Board on a weekly basis and to rail shippers within seven days of a request; however, EMA would add one important caveat: the data must be intelligible. Where rail carriers in the past have deigned or been forced to provide data, they have *technically* done so, but have organized the data in a manner calculated to be incomprehensible to even seasoned industry veterans. Thus, EMA appreciates and supports a requirement that carriers provide customer-individualized and machine-readable service data, but it cautions that the data should be *human*-readable too. The fact that, for example, data is organized into Excel spreadsheet tables or PDFs that do not require optical character recognition (OCR) is only useful so long as rail shipper employees are able to discern what a given table even represents. EMA submits that Board review of the data provided by carriers and the format in which it is presented is needed and appropriate and could be accomplished by instructing carriers as to a certain required format coupled with periodical Board audits. For too long, railroads have provided hieroglyphs when they are capable providing information plainly.¹

As an additional caveat to ensure this rulemaking achieves its aim, EMA submits that the rule must also apply to exempt commodities. EMA is grateful that the Board recognizes that such transportation, although exempted from Board regulation pursuant to 49 U.S.C. § 10502,

¹ To assist the Board with general oversight and to facilitate implementation of part 1145, the Board proposes to make permanent the collection of certain data that is relevant to service reliability and inadequate local service, and that is currently being collected on a temporary basis in Docket No. EP 770 (Sub-No. 1). See *Urgent Issues in Freight Rail Serv.—R.R. Reporting*, EP 770 (Sub-No. 1), slip op. at 6 (STB served May 6, 2022) (items 5 and 7). The Board has found that this data is particularly helpful to understanding conditions on the rail network. The Board’s permanent collection of this data under part 1145 would be adapted to the design of part 1145 as follows. The Class I carriers would be required to provide to the Board on a weekly basis: (1) for shipments moving in manifest service, the percentage of shipments for that week that were delivered to the destination within 24 hours of OETA, out of all shipments in manifest service on the carrier’s system during that week; and (2) for each of the carrier’s operating divisions and for the carrier’s overall system, the percentage of planned service windows during which the carrier successfully performed the requested local service, out of the total number of planned service windows on the relevant division or system for that week. EMA strongly supports making the collection of this data permanent as proposed here.

nonetheless could appropriately be subject to an order providing reciprocal switching under part 1145. Although such commodities may have been exempted for reasons related to competition, that rationale should not extend to this rule which is by contrast explicitly designed to address universally poor service. EMA members move such exempt commodities and are united in asserting that if their transportation is excluded from this rule, they will continue to experience the shoddy service this rule is meant to address.²

With that as preamble, EMA offers the following insights regarding specifics of the Board's three measurement standards:

I. Service Reliability

The Board proposes to measure a Class I rail carrier's success in delivering a shipment by comparing the original estimated time of arrival (OETA) that was provided by the rail carrier with the actual time of delivery to the designated destination, based on all shipments over a given lane during a period of 12 consecutive weeks. One proposed approach would set the success rate during the first year following enactment of the rule at 60% (*i.e.*, that 60% of shipments arrive within 24 hours of the OETA). The Board has alternately and additionally proposed that that percentage be raised to 70% after the second year in order to give carriers additional time to meet that still meager standard.

EMA is grateful for the Board's focus, explicit in its proposal, on carriers' existing poor service performance: "The standards that are proposed here are informed by the recent level of performance that carriers themselves have acknowledged largely do not meet the expectations or

² As a final note to ensure this rulemaking has its desired effect, EMA notes that a definition intrinsic to the rule would benefit from greater specificity. The phrase "improve service" or variations thereof naturally invites one to ask by what degree and rubric, among other questions. A more specific explanation of this term would be beneficial to any petitioner or respondent.

needs of the public.” Put in other words, railroad service today is so abjectly poor that delivery by railroads of 60% of goods *only one day late* is an *aspiration* in need of Board enforcement. To say the least, such is a sad commentary on North American railroad service at present and reflects the dire need for just this sort of action.

With deep respect for the Board’s step in the right direction, EMA submits that 60%, and indeed even 70%, represent far too low a bar for service reliability. Under the proposed rule, even those carriers who meet the standard with 60% *nearly* on-time performance would force some EMA members to curtail their operations, and still others frantically to seek out alternative transport by truck. There are not enough trucks or truck drivers to keep up with that demand, to say nothing of the greater expense passed onto the consumer and drastically greater polluting emissions caused by trucking goods as compared with rail shipping. Moreover, for many EMA members, trucking goods simply is not an option altogether.

With that in mind, EMA submits that the Board should implement the service reliability standard such that it requires no less than 80% of deliveries to reach their designated destination within 24 hours of the OETA. Such, it should be noted, is already a compromise, as that B-minus performance will still cause headaches for EMA’s members as they try to distribute their products from coast to coast. Additionally, EMA asks that the Board reduce the 12-week comparison period to six weeks. The proposed 12 weeks provides a given carrier too much opportunity to point to a sudden uptick in service after nearly three months as if such absolves it of responsibility for previous months of poor service and the consequences thereof. Moreover, any 12-week period of poor service would have devastating impact on EMA member operations, causing slowdowns that could hurt supply for months.³

³ The Board proposes to apply the service reliability standard only to shipments that are moving in manifest service, not to unit trains. The Board seeks comments on whether the better approach would be to apply the same or a similar

II. Service Consistency

As a measure of service consistency, the Board proposes to gauge a rail carrier's success in maintaining efficient movement of goods through the rail system by noting the time between a shipper's tender of the bill of lading and the rail carrier's actual or constructive placement of the shipment at the contemplated destination. Such, the NPRM proposes, would allow the shipper relief where the average transit time for loaded cars, unit trains, and empties increased by a certain percentage such as 20% or 25% as compared to the average transit time for the same 12-week period during the previous year.

As discussed in the context of Service Reliability, EMA submits that again the 12-week comparison period provides carriers too much opportunity to give the false impression of improvement that will not in fact last. Also, 12 weeks is too long a period of poor service for a shipper to withstand, as the repercussions could be monumental. Therefore, as before, EMA submits that a six-week period is appropriate, in order to avoid carriers distorting the quality of their performance given a longer runway in which to do so, and to ensure shippers including EMA members are not forced to endure a period so long as to potentially ruin their businesses. Additionally, lest there be any doubt, EMA believes it important to insert language into the Service Consistency standard stating that the variability in transit time is based on the *entire move* rather than any arbitrary subset thereof. Unless such language is inserted, one can be sure the railroads will seize the chance to contort the supposed relevant period to skirt their responsibilities, perhaps

service reliability standard to unit trains as applied to manifest traffic. EMA urges the Board to apply this same service reliability standard to unit trains. Otherwise, EMA unit-train shippers will lose the benefit of this standard despite being some of the largest shippers by rail in the US.

even doing so inconsistently across their various disputes with shippers. With the aforesaid caveats, EMA is comfortable with variability set at 20%.

III. Inadequate Local Service

In an effort to provide rail customers with information on all first mile and last mile service, the STB proposes to measure a rail carrier's success at performing local deliveries and pickups of loaded railcars or unloaded private or shipper-leased railcars within the applicable service window and to hold those carriers to a standard of 80% over a 12-consecutive-week period. Such service would have to be completed within the customary operating window of the affected shipper, not to exceed 12 hours.

Here again, EMA and its members appreciate the Board's attention to what it rightly identifies as "long sought-after information." However, EMA again submits that the standard as proposed provides too low a bar for rail carriers. As in the case of the proposed Service Reliability standard, an 80% standard for local service would trigger a backup of members' products, a backup that would only exacerbate if service remained consistent at that 80% bar.

Understanding the proposed 80% first mile/last mile standard to mean one missed and/or incorrect switch per business week (assuming one scheduled switch per business day), EMA submits that a 90% standard, reflective of one missed switch per two-business-week period, is a more appropriate compromise. As the Board has recognized, a violation of such standard would still result in the negligent carrier providing carriage in first mile/last mile situations.⁴ As a result,

⁴ With respect to the three service standards, EMA has some concerns that railroads will game the process and improve service whenever the numbers fall below the required standards, only to have service immediately become poor once the threat of a reciprocal switch case has subsided. In addition, an extreme situation could arise when a shipper obtains an emergency service order utilizing service from a competing carrier. This situation could result in better service provided by the competing carrier and stop any new data from the incumbent carrier. There would not appear to be a way forward for the shipper at that point if it wanted to obtain a reciprocal switching order from the Board. The Board

EMA supports prescription of terminal trackage rights such that the competing carrier can provide that service.

CONCLUSION

The Board's proposed rulemaking is a welcome and necessary action to counteract the lamentable service of American rail carriers. The poor quality of that service is reflected not only in the need for the rule, but also even in the still-low aspirational standards that EMA requests be included therein.⁵ With that in mind and with gratitude for the Board's action here, EMA asks that the Board build on its proposed rules to hold carriers to a higher standard than that initially proposed, one reflective of the needs of carriers' customers and of the American consumer. In service of that aim, EMA proposes (1) reciprocal switch agreements lasting a minimum of five years; (2) a service reliability standard that requires 80% performance as opposed to just 60%, and measured over a six-week period; (3) service consistency based on the entire move, and similarly measured over six-week periods rather than twelve-weeks such that carriers have less time to obscure what level of service they truly are providing; and, (4) a slightly higher 90% standard for local service, reflective of one missed and/or incorrect switch per two-business-week period.

Moreover, the Board's proposed rule limits the remedy to an area within a "terminal." EMA notes that this limitation makes the use of this remedy almost impossible for many rural EMA members who are captive but have no other Class I railroads nearer than over a hundred

should set a broader service standard for "unreasonable service" in addition to these three specific standards, in order to cover these situations, which are not contemplated by the proposed rule.

⁵ The Board has determined that much of the blame for the service issues over the last several years stemmed from the railroads' massive job cuts under the guise of Precision Scheduled Railroading, thereby leaving them without enough crew members to handle the needs of their shippers. Crew shortages certainly should not be an affirmative defense under these circumstances.

miles. This limitation leaves them without a remedy to fix poor service for the most part. As a result, EMA urges the Board to broaden this definition or at least develop a new rule that would protect these captive shippers.

We fully support the Board instituting the new rules as suggested here by EMA.

Respectfully submitted,

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Dated: November 7, 2023